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Title 16. Crimes and Offenses (Chapters 1—6)

Including Annotations to the Georgia Reports
and the Georgia Appeals Reports

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THIS SUPPLEMENT CONTAINS

Statutes:

All laws specifically codified by the General Assembly of the State of Georgia through the 2012 Regular Session of the General Assembly.

Annotations of Judicial Decisions:

Case annotations reflecting decisions posted to LexisNexis® through March 30, 2012. These annotations will appear in the following traditional reporter sources: Georgia Reports; Georgia Appeals Reports; Southeastern Reporter; Supreme Court Reporter; Federal Reporter; Federal Supplement; Federal Rules Decisions; Lawyers' Edition; United States Reports; and Bankruptcy Reporter.

Annotations of Attorney General Opinions:

Constructions of the Official Code of Georgia Annotated, prior Codes of Georgia, Georgia Laws, the Constitution of Georgia, and the Constitution of the United States by the Attorney General of the State of Georgia posted to LexisNexis® through March 30, 2012.

Other Annotations:

References to:

Emory Bankruptcy Developments Journal.
Emory International Law Review.
Emory Law Journal.
Georgia Journal of International and Comparative Law.
Georgia Law Review.
Georgia State University Law Review.
Mercer Law Review.
Georgia State Bar Journal.
Georgia Journal of Intellectual Property Law.
American Jurisprudence, Second Edition.
American Jurisprudence, Pleading and Practice.
American Jurisprudence, Proof of Facts.
American Jurisprudence, Trials.
Corpus Juris Secundum.
Uniform Laws Annotated.
American Law Reports, First through Sixth Series.
American Law Reports, Federal.

Tables:

In Volume 41, a Table Eleven-A comparing provisions of the 1976 Constitution of Georgia to the 1983 Constitution of Georgia and a Table Eleven-B comparing provisions of the 1983 Constitution of Georgia to the 1976 Constitution of Georgia.

An updated version of Table Fifteen which reflects legislation through the 2012 Regular Session of the General Assembly.

Indices:

A cumulative replacement index to laws codified in the 2012 supplement pamphlets and in the bound volumes of the Code.

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TITLE 16
CRIMES AND OFFENSES
VOLUME 14

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CHAPTER 1

GENERAL PROVISIONS

Sec. 16-1-12. Restrictions on contingency fee compensation of attorney appointed to represent state in forfeiture action.

16-1-3. Definitions.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
PUBLIC PLACE
PROSECUTION

General Consideration

Term “property.” — Taxpayers were not entitled to a theft loss under 26 U.S.C.S. § 165(e) with respect to a decline in value of publicly traded stock, as a theft by taking did not occur under O.C.G.A. § 16-8-2 because a corporation did not unlawfully take or appropriate any property from the taxpayer, and there was no evidence of any intention by the corporation or its executives to deprive the taxpayer of the property at issue. Although corporate stock, which was in the taxpayer’s control after he exercised his stock options, subsequently declined in value, there was no evidence that the corporate executives had any specific intent with regard to the taxpayer to take or appropriate his stock by devaluation or by any other means; rather, the goal of the corporation, including its later-convicted executives, was to increase the value of the stock, including any stock owned and controlled by the taxpayer. *Schroerlucke v. United States*, 100 Fed. Cl. 584 (Fed. Cl. 2011).

Cited in *DeLong v. State*, 310 Ga. App.

518, 714 S.E.2d 98 (2011); *Wells v. State*, 313 Ga. App. 528, 722 S.E.2d 133 (2012).

Public Place

Jail is not a public place. — Defendant’s conviction for affray in violation of O.C.G.A. § 16-11-32 was reversed because the altercation occurred in the Hall County Jail, which was not a “public place” as required for conviction pursuant to O.C.G.A. §§ 16-1-3(15) and 16-6-8(d). *Singletary v. State*, 310 Ga. App. 570, 713 S.E.2d 698 (2011).

Prosecution

Indictment charging involuntary manslaughter by simple battery sufficient. — Indictment charging the defendant with involuntary manslaughter by the commission of the unlawful act of simple battery in violation of O.C.G.A. §§ 16-5-3(a) and 16-5-23(a) was not void because the factual allegations in the indictment sufficiently described the offense of involuntary manslaughter in the commission of the unlawful act of simple battery. *Morris v. State*, 310 Ga. App. 126, 712 S.E.2d 130 (2011).

16-1-6. Conviction for lesser included offenses.

JUDICIAL DECISIONS

ANALYSIS

ARMED ROBBERY
ASSAULT

CONTROLLED SUBSTANCES

KIDNAPPING

MURDER

RAPE

CHILD MOLESTATION

OTHER OFFENSES INVOLVING CHILDREN

MISCELLANEOUS CRIMES

Armed Robbery

Separate convictions for armed robbery and aggravated assault were barred, etc.

Defendants' robbery and aggravated assault convictions, under O.C.G.A. §§ 16-5-21 and 16-8-40, merged because, while aggravated assault did not require taking property from another, aggravated assault was proved by the same or less than all facts required to show robbery, as the assault forming the basis of the aggravated assault with intent to rob, which was pointing a pistol at the victim, was "contained within" the element of robbery requiring the defendants to have used force, intimidation, threat or coercion, or placed the victim in fear of immediate serious bodily injury. *Washington v. State*, 310 Ga. App. 775, 714 S.E.2d 364 (2011).

Defendant's conviction for aggravated assault merged into the defendant's conviction for attempted armed robbery because the relevant aggravated assault provision did not require proof of any fact that was not also required to prove the attempted armed robbery as that offense could have been proved under the indictment in the case. *Garland v. State*, 311 Ga. App. 7, 714 S.E.2d 707 (2011).

Assault

Aggravated assault merged into aggravated battery.

Defendant's aggravated battery and aggravated assault convictions merged because the counts of the indictment were based on the same conduct of hitting the victim with a hammer, resulting in serious bodily injury to the victim's hand and one of the victim's fingers being rendered useless when the victim placed the victim's hands up in an attempt to protect the victim's head; the aggravated assault was a lesser included offense of the aggravated battery because the assault re-

quired proof of a less serious injury than the aggravated battery. *Thomas v. State*, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Aggravated assault did not merge into aggravated battery. — Crimes did not merge legally or factually because aggravated assault required proof that the defendant assaulted the victim using a deadly weapon, aggravated battery required proof that the defendant maliciously caused bodily harm to the victim by rendering a member of the victim's body useless, and kidnapping required asportation of the victim. The offenses were distinct with each requiring proof of a fact which the others did not. *Reynolds v. State*, 311 Ga. App. 119, 714 S.E.2d 621 (2011).

Aggravated assault and kidnapping. — Crimes did not merge legally or factually because aggravated assault required proof that the defendant assaulted the victim using a deadly weapon, aggravated battery required proof that the defendant maliciously caused bodily harm to the victim by rendering a member of the victim's body useless, and kidnapping required asportation of the victim. The offenses were distinct with each requiring proof of a fact which the others did not. *Reynolds v. State*, 311 Ga. App. 119, 714 S.E.2d 621 (2011).

Possession of destructive device offense did not merge with aggravated assault. — Defendant's aggravated assault and possession of a destructive device convictions did not merge because the possession offense required that the weapon function in a certain way and have certain dimensions, and the assault offense required that the victim was conscious of the risk of immediately receiving a violent injury by use of an offensive weapon. Because each offense required proof of a fact not required for the other, there was no merger under the required evidence test. *Mason v. State*, 312 Ga. App. 723, 719 S.E.2d 581 (2011).

Controlled Substances

Imposition of separate trafficking sentences proper. — Trial court did not err under O.C.G.A. §§ 16-1-6(2) and 16-1-7(a)(1) by sentencing the defendant separately for trafficking in methamphetamine, in violation of O.C.G.A. § 16-13-31, and trafficking in ecstasy, in violation of O.C.G.A. § 16-13-31.1, when the substance which was found in the defendant's vehicle tested positive for both methamphetamine and ecstasy as there was no evidence that chemical compounds or elements were shared between the drugs. *Ahmad v. State*, 312 Ga. App. 703, 719 S.E.2d 563 (2011).

Kidnapping

Aggravated assault and kidnapping.

Trial court did not err in declining to merge kidnapping counts with aggravated assault counts because the aggravated assault involved different conduct from the kidnapping and was completed prior thereto and, thus, the same conduct did not establish the commission of both offenses; even if the kidnapping counts involved the same conduct as the aggravated assault, neither was included in the other after application of the "required evidence" test. *Jones v. State*, 290 Ga. 670, No. S12A0040, 2012 Ga. LEXIS 256 (2012).

Murder

Aggravated assault and malice murder.

Defendant's conviction for aggravated assault of the victim merged into the conviction for malice murder of the victim because there was no evidence that the victim suffered a non-fatal injury prior to a deliberate interval in the attack and a fatal injury thereafter; the forensic pathologist who conducted the autopsy catalogued the victim's wounds as "chop injuries" that fractured the victim's skull and incapacitated the victim and were likely inflicted with a hatchet, punctures and superficial, deep, and very deep incisions and stab wounds that were inflicted by knives. *Alvelo v. State*, 290 Ga. 609, 724 S.E.2d 377 (2012).

Indictment charging involuntary manslaughter by simple battery sufficient. — Indictment charging the defendant with involuntary manslaughter by the commission of the unlawful act of simple battery in violation of O.C.G.A. §§ 16-5-3(a) and 16-5-23(a) was not void because the factual allegations in the indictment sufficiently described the offense of involuntary manslaughter in the commission of the unlawful act of simple battery. *Morris v. State*, 310 Ga. App. 126, 712 S.E.2d 130 (2011).

Aggravated battery merged with malice murder.

Evidence of a three-year-old child's injuries and death was sufficient to support the defendant's conviction for malice murder, felony murder, aggravated assault, and aggravated battery; however, the defendant's conviction for aggravated battery based on the fracture of the child's ribs should have been merged into the defendant's conviction for murder under O.C.G.A. § 16-1-6(b). *Soilberry v. State*, 289 Ga. 770, 716 S.E.2d 162 (2011).

Rape

Merger of attempted rape and aggravated assault. — Defendant's conviction for aggravated assault with intent to rape under O.C.G.A. § 16-5-21(a)(1) merged into the defendant's conviction for attempted rape under O.C.G.A. §§ 16-4-1 (criminal attempt) and 16-6-1 (rape) because the same evidence supported both convictions and, therefore, the aggravated assault conviction was vacated. *Smith v. State*, 313 Ga. App. 170, 721 S.E.2d 165 (2011).

Child Molestation

Child molestation and cruelty to children. — Trial court did not err in failing to merge the defendant's convictions for child molestation, O.C.G.A. § 16-6-4(a), and cruelty to children because each crime required proof of at least one additional element that the other did not, and thus, even if the same conduct established the commission of both child molestation and cruelty to children, the two crimes did not merge; cruelty to children, but not child molestation, requires proof that the victim was a child under the

age of 18 who was caused cruel or excessive physical or mental pain, O.C.G.A. § 16-5-70(b), and in contrast, child molestation, but not cruelty to children, requires proof that the victim was under 16 years of age and that the defendant performed an immoral or indecent act upon or in the presence of the child for the purpose of arousing or satisfying the defendant's or the child's sexual desires, O.C.G.A. § 16-6-4(a). *Chandler v. State*, 309 Ga. App. 611, 710 S.E.2d 826 (2011).

Other Offenses Involving Children

Deprivation of minor and cruelty to children. — Trial court did not err in failing to merge the defendant's misdemeanor convictions for contributing to the deprivation of a minor, O.C.G.A. § 16-12-1(b)(3), with the defendant's corresponding felony convictions for cruelty to children in the second degree, O.C.G.A. § 16-5-70(c), pursuant to the "required evidence" test, the offenses did not merge as a matter of law; the offenses of cruelty

to children in the second degree and contributing to the deprivation of a minor each have at least one essential element that the other does not: causing the child cruel or excessive physical or mental pain and wilfully failing to provide the child with the proper care necessary for his or her health, respectively. *Staib v. State*, 309 Ga. App. 785, 711 S.E.2d 362 (2011).

Miscellaneous Crimes

Harassing phone calls and aggravated stalking. — Trial court did not err by failing to give the defendant's requested charges on the lesser included offenses of harassing phone calls and violation of a temporary protective order because the state's evidence was sufficient to establish all of the elements of the aggravated stalking offenses as indicted; under the evidence, either the defendant was guilty of the indicted offenses or the defendant was guilty of no offense whatsoever. *Brooks v. State*, 313 Ga. App. 789, 723 S.E.2d 29 (2012).

16-1-7. Multiple prosecutions for same conduct.

JUDICIAL DECISIONS

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INCLUDED CRIMES

2. CRIMES AGAINST THE PERSON
3. CRIMES AGAINST PROPERTY

JOINT PROSECUTION OF OFFENSES

1. IN GENERAL
2. CRIMES AGAINST THE PERSON
4. APPLICATION TO OTHER CRIMES

SEVERANCE

3. SENTENCING

General Consideration

Attachment of jeopardy.

Trial court erred in holding that jeopardy had not attached on the previous charges filed against the defendant due to a mistrial because the defendant was placed in jeopardy when the jury was sworn in the first trial. *Herrington v. State*, No. A11A1860, 2012 Ga. App. LEXIS 328 (Mar. 23, 2012).

Included Crimes

2. Crimes Against the Person

Armed robbery as included offense of malice murder.

Defendant's conviction for armed robbery was properly not merged into a malice murder conviction pursuant to O.C.G.A. § 16-1-7(a)(1), based on the "required evidence" test, as each offense required proof of an element that the other

did not. *Culpepper v. State*, 289 Ga. 736, 715 S.E.2d 155 (2011).

Aggravated assault. — Defendant's convictions for aggravated assault with a deadly weapon and aggravated assault with intent to murder merged for sentencing because both counts of the indictment alleged that the defendant committed aggravated assault by slashing the victim's neck; although one count alleged that the assault was done with a deadly weapon and the other alleged that it was done with the intent to commit murder, O.C.G.A. § 16-5-21(a)(1) and (a)(2), the counts were clearly based on a single act since the razor or knife used in that assault broke while it was pressed against the victim's neck and, thus, the counts merely charged the same act of aggravated assault being committed in two of the multiple ways set out in O.C.G.A. § 16-3-21. *Thomas v. State*, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Aggravated battery and aggravated assault. — Defendant's aggravated battery convictions did not merge because the counts of the indictment were predicated on different conduct; in order to prove one count of the indictment, the state had to show that the victim threw bleach in the victim's eyes, and in order to prove another count of the indictment, the state had to prove that the victim's finger was rendered useless because the finger was repeatedly struck with a hammer. *Thomas v. State*, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Aggravated assault with deadly weapon and with object. — Defendant's convictions for aggravated assault with a deadly weapon and aggravated assault with an object, device, or instrument did not merge because the counts of the indictment requiring the state to prove that the defendant slashed the victim's neck with a sharp-edged instrument, hit the victim with a hammer and wrapped a cord around the victim's neck with the intent to murder were based on different conduct and merger of those convictions was not required. *Thomas v. State*, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Aggravated assault and malice murder.

Defendant's conviction for aggravated

assault should have been merged into a malice murder conviction pursuant to O.C.G.A. § 16-1-7(a)(1), based on the "required evidence" test, as the aggravated assault, as pled, did not require proof of a fact not required to have been proved in the malice murder. *Culpepper v. State*, 289 Ga. 736, 715 S.E.2d 155 (2011).

Defendant's conviction for aggravated assault of the victim merged into the conviction for malice murder of the victim because there was no evidence that the victim suffered a non-fatal injury prior to a deliberate interval in the attack and a fatal injury thereafter; the forensic pathologist who conducted the autopsy catalogued the victim's wounds as "chop injuries" that fractured the victim's skull and incapacitated the victim and were likely inflicted with a hatchet, punctures and superficial, deep, and very deep incisions and stab wounds that were inflicted by knives. *Alvelo v. State*, 290 Ga. 609, 724 S.E.2d 377 (2012).

Aggravated assault and armed robbery.

Defendant's convictions for armed robbery and aggravated assault did not merge because each crime required proof of conduct that the other did not; the armed robbery as charged in the indictment required proof of intent to rob and that the victim's wallet was taken, while the aggravated assaults required proof that the victim's neck was slashed with a sharp weapon. *Thomas v. State*, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Trial court erred in failing to merge the defendant's conviction for aggravated assault with a deadly weapon, O.C.G.A. § 16-5-21(a)(2), into the defendant's conviction for armed robbery conviction, O.C.G.A. § 16-8-41(a), because the act of using an offensive weapon for the purposes of committing an armed robbery was the legal equivalent of assault for the purposes of committing an aggravated assault; it is not determinative under the merger analysis that the desired object of a defendant's armed robbery was something other than that which he or she actually took, but instead, what dictates merger is the fact that both crimes for which the defendant was convicted were predicated upon the same conduct. *Hall v.*

State, 313 Ga. App. 66, 720 S.E.2d 181 (2011).

Aggravated assault and aggravated battery.

Defendant's aggravated battery and aggravated assault convictions merged because the counts of the indictment were based on the same conduct of hitting the victim with a hammer, resulting in serious bodily injury to the victim's hand, and one of the victim's fingers being rendered useless when the victim placed the victim's hands up in an attempt to protect the victim's head; the aggravated assault was a lesser included offense of the aggravated battery because the aggravated assault required proof of a less serious injury than the aggravated battery. *Thomas v. State*, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Aggravated assault and kidnapping.

Trial court did not err in declining to merge kidnapping counts with aggravated assault counts because the aggravated assault involved different conduct from the kidnapping and was completed prior thereto and, thus, the same conduct did not establish the commission of both offenses; even if the kidnapping counts involved the same conduct as the aggravated assault, neither was included in the other after application of the "required evidence" test. *Jones v. State*, 290 Ga. 670, No. S12A0040, 2012 Ga. LEXIS 256 (2012).

Child molestation and cruelty to children. — Trial court did not err in failing to merge the defendant's convictions for child molestation, O.C.G.A. § 16-6-4(a), and cruelty to children because each crime required proof of at least one additional element that the other did not, and thus, even if the same conduct established the commission of both child molestation and cruelty to children, the two crimes did not merge; cruelty to children, but not child molestation, requires proof that the victim was a child under the age of 18 who was caused cruel or excessive physical or mental pain, O.C.G.A. § 16-5-70(b), and in contrast, child molestation, but not cruelty to children, requires proof that the victim was under 16 years of age and that the defendant per-

formed an immoral or indecent act upon or in the presence of the child for the purpose of arousing or satisfying the defendant's or the child's sexual desires under O.C.G.A. § 16-6-4(a). *Chandler v. State*, 309 Ga. App. 611, 710 S.E.2d 826 (2011).

3. Crimes Against Property

Three vehicle collisions arising out of erratic driving arose from the same conduct. — Pursuant to O.C.G.A. § 16-1-7, a defendant could not be prosecuted for DUI and other traffic citations by a city after the defendant had already pled guilty to charges issued by the state patrol arising out of the same course of conduct. Although the defendant struck three different cars, there was no break in the action of the defendant's erratic driving. *Dean v. State*, 309 Ga. App. 459, 711 S.E.2d 42 (2011).

Joint Prosecution of Offenses

1. In General

Prosecutor's knowledge of offenses.

State was prohibited by O.C.G.A. § 16-1-7(b) from adding new charges to the indictment because the charges in the previous two-count indictment were for different offenses than the ones the state added to the re-indictment, and all of the crimes were actually known to the prosecutor when the defendant commenced the first prosecution. *Herrington v. State*, No. A11A1860, 2012 Ga. App. LEXIS 328 (Mar. 23, 2012).

2. Crimes Against the Person

Felony murder and felony criminal attempt to possess cocaine. — Separate judgment of conviction and sentence for criminal attempt to possess cocaine was vacated because after the jury found the defendant guilty of felony murder while in the commission of the felony of criminal attempt to possess cocaine, and also of the felony of criminal attempt to possess cocaine, the defendant was sentenced on each charge, but the defendant could not be sentenced on both felony murder and the underlying felony when found guilty of both. *Sapp v. State*, 290 Ga. 247, 719 S.E.2d 434 (2011).

4. Application to Other Crimes

Unauthorized offers to sell. — Because defendant’s argument on appeal was a challenge to defendant’s convictions for making 91 unauthorized offers to sell recorded material under O.C.G.A. § 16-8-60(b), and because an O.C.G.A. § 16-1-7(a) motion to correct or modify an illegal sentence was not an appropriate remedy to attack a conviction in a criminal case, the defendant did not properly challenge the convictions; defendant’s only recourse was through habeas corpus proceedings. *Rogers v. State*, 314 Ga. App. 398, 724 S.E.2d 417 (2012).

Severance

3. Sentencing

Separate sentences for drug trafficking offenses. — Trial court did not

err under O.C.G.A. §§ 16-1-6(2) and 16-1-7(a)(1) by sentencing the defendant separately for trafficking in methamphetamine, in violation of O.C.G.A. § 16-13-31, and trafficking in ecstasy, in violation of O.C.G.A. § 16-13-31.1, when the substance which was found in the defendant’s vehicle tested positive for both methamphetamine and ecstasy as there was no evidence that chemical compounds or elements were shared between the drugs. *Ahmad v. State*, 312 Ga. App. 703, 719 S.E.2d 563 (2011).

16-1-8. When prosecution barred by former prosecution.

JUDICIAL DECISIONS

ANALYSIS

RETRIAL
APPLICATION GENERALLY

Retrial

Effect of reversal for error at trial.
Double jeopardy protection did not bar a second trial on the same charges because the defendant’s motion for new trial was granted due to an erroneous evidentiary ruling. *State v. Caffee*, No. S11A1529, 2012 Ga. LEXIS 344 (Mar. 19, 2012).

When the actions of a prosecutor cause a mistrial, etc.

Trial court did not err in denying the defendant’s plea of former jeopardy because its finding that the prosecution’s question on cross-examination was an unintentional reference to the defendant’s right to remain silent was not clearly erroneous; the record contained evidence to support the trial court’s finding that the prosecutor’s question was not intended to

goad the defense into seeking a mistrial. *Demory v. State*, 313 Ga. App. 265, 721 S.E.2d 93 (2011).

Application Generally

State permitted to prove case against defendant. — Because the defendant’s brother was prosecuted in federal court for possession of a cocaine mixture in an apartment, the state was permitted to prove the state’s case against the defendant by proof of joint constructive possession; the state did not prosecute the brother for the brother’s joint constructive possession of the cocaine mixture in the apartment, but the United States did prosecute the brother in federal court. *Holiman v. State*, 313 Ga. App. 76, 720 S.E.2d 363 (2011).

16-1-12. Restrictions on contingency fee compensation of attorney appointed to represent state in forfeiture action.

(a) In any forfeiture action brought pursuant to this title, an attorney appointed by the Attorney General or district attorney as a special assistant attorney general, special assistant district attorney, or other attorney appointed to represent this state in such forfeiture action shall not be compensated on a contingent basis by a percentage of assets which arise or are realized from such forfeiture action. Such attorneys shall also not be compensated on a contingent basis by an hourly, fixed fee, or other arrangement which is contingent on a successful prosecution of such forfeiture action.

(b) Nothing in this Code section shall be construed as prohibiting or otherwise restricting the Attorney General or a district attorney from appointing special assistants or other attorneys to assist in the prosecution of any action brought pursuant to this title. (Code 1981, § 16-1-12, enacted by Ga. L. 2012, p. 1035, § 2/SB 181.)

Effective date. — This Code section became effective July 1, 2012.

Editor's notes. — Ga. L. 2012, p. 1035, § 3/SB 181, approved by the Governor May 2, 2012, provided that the effective

date of this Code section is July 1, 2011. See Op. Att'y Gen. No. 76-76 for construction of effective date provisions that precede the date of approval by the Governor.

CHAPTER 2

CRIMINAL LIABILITY

ARTICLE 1

CULPABILITY

16-2-1. "Crime" defined.

JUDICIAL DECISIONS

ANALYSIS

CRIMINAL NEGLIGENCE

Criminal Negligence

Defendant acted with requisite criminal negligence. — Evidence was sufficient to support the defendant's conviction for cruelty to children in the second degree, O.C.G.A. § 16-5-70(c), because the evidence authorized a finding that the defendant acted with the requi-

site criminal negligence under O.C.G.A. §§ 16-2-1(b) and 16-5-70(c) in causing the victim to sustain severe, painful burns to the victim's body; the state's expert testified that the victim's burns were inconsistent with the defendant's claim that the incident leading to the victim's injuries was merely accidental. *Wells v. State*, 309 Ga. App. 661, 710 S.E.2d 860 (2011).

16-2-2. Effect of misfortune or accident on guilt.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Charge not required where participation in crime denied.

Trial court did not err in refusing to give the defendant's requested charge on accident under O.C.G.A. § 16-2-2 because the defendant repeatedly denied striking any vehicle in a parking lot. *Sevostiyanova v. State*, 313 Ga. App. 729, 722 S.E.2d 333 (2012).

Failure to charge the jury on the affirmative defense of accident, etc.

In a vehicular homicide case, any error in the trial court's failure to charge the jury on the law of accident under O.C.G.A. § 16-2-2 was waived because the proposed charge was not in the record, and

there was no evidence that it was the pattern charge, and the defendant failed to object after the charge was given as required by O.C.G.A. § 17-8-58(a). *Rouen v. State*, 312 Ga. App. 8, 717 S.E.2d 519 (2011).

Because the defense of accident was available to a defendant charged with strict liability offenses, and because the defendant admitted under oath that the defendant failed to yield to a pedestrian in a crosswalk, the trial court erred by refusing to give the requested charge on accident under O.C.G.A. § 16-2-2. *Ogilvie v. State*, 313 Ga. App. 305, 721 S.E.2d 549 (2011).

Cited in *Sears v. State*, 290 Ga. 1, 717 S.E.2d 453 (2011).

16-2-3. Presumption of sound mind and discretion.

JUDICIAL DECISIONS

Directed verdict in competency trial. — Trial court did not err in denying the defendant's motion for a directed verdict under O.C.G.A. § 9-11-50 in the defendant's competency trial because the evidence on competency was in conflict; even though the defendant's expert witness opined that the defendant was not competent to stand trial, the state's expert testified that the defendant was competent to do so. *Smith v. State*, 312 Ga. App. 174, 718 S.E.2d 43 (2011).

Competency established. — While the defendant presented expert testimony,

based on the defendant's performance on various cognitive tests, that the defendant was not competent to stand trial, the finding of competency to stand trial was supported by the testimony of the state's expert, who opined that the defendant understood the nature and object of the proceedings, had a basic comprehension of the defendant's own condition in reference to the proceedings, and had the ability to assist counsel in a defense. *Tiegreen v. State*, No. A11A1818, 2012 Ga. App. LEXIS 294 (Mar. 16, 2012).

16-2-6. Intention a question of fact.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

APPLICATION

General Consideration

Sufficiency of evidence.

Trial court did not err in finding that the defendant was a party to the crime because there was ample evidence, based upon the defendant's actions and the defendant's presence, companionship, conduct, and demeanor before, during, and after the commission of the crime, to conclude that the defendant was more than "merely present" during the commission of the crimes; while in a car with the victim and companions, the front-seat passenger pulled out a gun and shot the victim, and during the incident, the defendant did not say or do anything to intervene. *Cook v. State*, 314 Ga. App. 289, 723 S.E.2d 709 (2012).

Cited in *Hickman v. State*, 311 Ga. App. 544, 716 S.E.2d 597 (2011); *Fairwell v. State*, 311 Ga. App. 834, 717 S.E.2d 332 (2011).

Application

Intent to arouse or satisfy sexual desires.

Jury was presented with sufficient evidence to find the defendant guilty of child molestation in violation of O.C.G.A. § 16-6-4(a)(1) because the testimony of the defendant's former wife regarding what she observed on the night in question, i.e., that the defendant and the victim were asleep together with their underwear pulled down and that she saw what appeared to be fecal matter smeared on the victim's buttocks and the bed sheets, was sufficient for the jury to conclude that the victim's and the defendant's otherwise inexplicable mutual exposure was for the purpose of satisfying the defendant's own sexual desires. *DeLong v. State*, 310 Ga. App. 518, 714 S.E.2d 98 (2011).

Evidence that a defendant became highly intoxicated while having visitation with his seven-year-old daughter, that he licked her vagina, kissed her with his tongue in her mouth, and made her rub her hand on his penis was sufficient to support convictions for aggravated child molestation in violation of O.C.G.A. § 16-6-4(c). A jury could infer from the evidence that the defendant's intent was to arouse and satisfy his sexual desires, pursuant to O.C.G.A. § 16-2-6. *Obeginski v. State*, 313 Ga. App. 567, 722 S.E.2d 162 (2012).

Intent to assist in possession and sale of marijuana. — There was sufficient evidence of knowledge and intent to assist with or participate in the crime of possession of marijuana with intent to distribute when a defendant drove the defendant's roommate to a location in another county and the roommate brought along a sealed, insulated bag, which the defendant placed in the back compartment of the car. *Able v. State*, 312 Ga. App. 252, 718 S.E.2d 96 (2011).

Intent to make terroristic threats. — Defendant was properly convicted of terroristic threats in violation of O.C.G.A. § 16-11-37(a) because the jury was presented with sufficient evidence by which to find that the defendant intended to terrorize officers by communicating a threat to blow up the defendant's home using propane; although there was testimony that the defendant suffered from a history of mental illness, the defendant did not plead the affirmative defense of insanity, and the issue of the defendant's criminal intent was a question of fact for the jury, which was presented with sufficient evidence to establish the requisite criminal intent. *Layne v. State*, 313 Ga. App. 608, 722 S.E.2d 351 (2012).

ARTICLE 2

PARTIES TO CRIMES

16-2-20. When a person is a party to a crime.

Law reviews. — For article, "State v. Jackson and the Explosion of Liability for

Felony Murder," see 62 Mercer L. Rev. 1335 (2011).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

AIDING AND ABETTING

APPLICATION

1. IN GENERAL
2. CHILD ABUSE AND NEGLECT
3. DRUG RELATED OFFENSES
4. MURDER OR MANSLAUGHTER
6. PROPERTY OFFENSES

General Consideration**Presence and assistance in commission of crime.**

Pursuant to O.C.G.A. § 16-2-20, because the defendant was not only present when a robbery was committed, but also actively aided and abetted the robbery's commission and received a portion of the money taken from the victim, the evidence was sufficient to find the defendant guilty of robbery by force beyond a reasonable doubt under O.C.G.A. § 16-8-40(a)(1). *Brown v. State*, 314 Ga. App. 375, 724 S.E.2d 410 (2012).

Aiding and Abetting**Evidence sufficient as to aiding and abetting armed robbery.**

Defendant's conviction of attempt to commit armed robbery was affirmed because the defendant discussed the attempted armed robbery beforehand with the codefendants, provided part of the disguise for the defendant's sibling, drove the codefendants to the crime scene, was present near the scene of the attempted robbery, and fled the scene after the attempted robbery. *Skipper v. State*, No. A11A1912, 2012 Ga. App. LEXIS 289 (Mar. 16, 2012).

Evidence sufficient for conviction.

Evidence was sufficient to support the defendant's convictions of aiding and abetting, under O.C.G.A. § 16-2-20, defendant's spouse in enticing a minor child for indecent purposes in violation of O.C.G.A. § 16-6-5(a) and of child molestation. Evidence was presented that the defendant had prior knowledge of the intended crimes, shared in the intent of the spouse to entice the minor victim to the defendants' home, and was present for the

crimes of child molestation. *Dockery v. State*, 309 Ga. App. 584, 711 S.E.2d 100 (2011).

Because the victim's testimony was legally sufficient under O.C.G.A. § 24-4-8 to establish that the defendants assaulted the victim with intent to rob, the issue of which defendant actually held the weapon was immaterial; therefore, pursuant to O.C.G.A. § 16-2-20(a), the evidence was sufficient to find both defendants guilty of aggravated assault with intent to rob and of possession of a firearm during the commission of a felony under O.C.G.A. §§ 16-5-21(a)(1) and 16-11-106. *Clark v. State*, 311 Ga. App. 58, 714 S.E.2d 736 (2011).

Defendant was properly convicted of financial identity fraud in violation of O.C.G.A. § 16-9-120 because the circumstantial evidence was sufficient to authorize a jury to find that the defendant, either directly or as a party to a crime under O.C.G.A. § 16-2-20, committed financial identity fraud by accessing the resources of the victims through the use of identifying information without the authorization or permission of the victims, with the intent to unlawfully appropriate the victim's resources to the defendant's own use; the federal tax identification number of either victim was required as part of the credit card application to obtain temporary charge passes, which the defendant used to purchase thousands of dollars worth of merchandise in a short period of time. *Zachery v. State*, 312 Ga. App. 418, 718 S.E.2d 332 (2011).

Because the driver of a delivery truck was forced at gunpoint by defendant's accomplice to drive a substantial distance to a secluded dirt road, and because the defendant followed the truck in another

vehicle, pursuant to O.C.G.A. §§ 16-2-20 and 16-5-40, the evidence was sufficient to convict the defendant of kidnapping and possession of a firearm during the commission of a felony. *Sipplen v. State*, 312 Ga. App. 342, 718 S.E.2d 571 (2011).

Planning robbery and driving getaway car, etc.

Trial court had sufficient evidence to convict a defendant of armed robbery and possession of a firearm during the commission of a crime as a party to those crimes by aiding and abetting, pursuant to O.C.G.A. § 16-2-20, given evidence that the defendant helped plan the robberies of two game rooms, drove the getaway vehicle, and participated in the division of the proceeds. *Norman v. State*, 311 Ga. App. 721, 716 S.E.2d 805 (2011).

Jury instructions.

There was slight evidence to justify a charge as to parties to the crime as two or more persons could have been involved; it was possible that the defendant acted with an accomplice who fled the scene in a yellow car, while the defendant fled the scene in a green car, because several witnesses claimed to have seen the robber leave in a yellow car, and other witnesses said the perpetrator got into a green car. *Williams v. State*, 312 Ga. App. 22, 717 S.E.2d 532 (2011).

Application

1. In General

Possession of firearm during commission of crime.

Jury's verdict of acquittal on an aggravated assault charge and guilty on the charge of possession of a firearm during the commission of a crime was not necessarily inconsistent because the jury was free to reject the defendant's testimony that the defendant did not know the defendant's passenger had a gun and accept the defendant's testimony that the defendant was unaware of the intended robbery. *Morrell v. State*, 313 Ga. App. 443, 721 S.E.2d 643 (2011).

Evidence sufficient to support finding of participation.

Evidence was sufficient to authorize the defendant's convictions for hijacking a motor vehicle, in violation of O.C.G.A.

§ 16-5-44.1(b), armed robbery, in violation of O.C.G.A. § 16-8-41, aggravated assault, in violation of O.C.G.A. § 16-5-21(a)(2), and possession of a knife during the commission of a crime, in violation of O.C.G.A. § 16-11-106(b), based on the defendant's involvement as a party to the crimes, or as a coconspirator under O.C.G.A. § 16-2-20(b). The evidence presented was that: (1) when two people walked past the victim's parked vehicle, one of the people held a knife to the victim's stomach and ordered the victim to give the person the victim's wallet and keys; (2) the victim complied; (3) the person with the knife got into the driver's seat and the defendant, who had stood nearby during the incident, got into the passenger seat; (3) the victim identified the defendant as the person who got into the passenger seat; (4) the people drove away, but were apprehended; (5) the victim's wallet was recovered, on the ground to the rear of the vehicle, on the passenger side; and (6) the defendant wanted to leave the area because there was a warrant for the defendant's arrest. *Harrelson v. State*, 312 Ga. App. 710, 719 S.E.2d 569 (2011).

Trial court did not err in finding that the defendant was a party to the crime because there was ample evidence, based upon the defendant's actions and the defendant's presence, companionship, conduct, and demeanor before, during, and after the commission of the crime, to conclude that the defendant was more than "merely present" during the commission of the crimes; while in a car with the victim and companions, the front-seat passenger pulled out a gun and shot the victim, and during the incident, the defendant did not say or do anything to intervene. *Cook v. State*, 314 Ga. App. 289, 723 S.E.2d 709 (2012).

2. Child Abuse and Neglect

Child cruelty.

Jury was authorized to find that the defendant was a party to the codefendant's crime of cruelty to children in the first degree in violation of O.C.G.A. §§ 16-2-20 and 16-5-70(b) because the victim's testimony showed that the defendant was present during the codefendant's

beating of the victim yet did nothing to stop the codefendant or otherwise help the victim; there was also evidence that the defendant was not only aware of prior abuse that the victim sustained via a belt but had also participated in such prior abuse. *Tabb v. State*, 313 Ga. App. 852, 723 S.E.2d 295 (2012).

3. Drug Related Offenses

Trafficking in cocaine.

Trial court did not err in convicting the defendant of trafficking in cocaine in violation of O.C.G.A. § 16-13-31(a)(1) because the jury was authorized to find that the defendant was in joint constructive possession of the cocaine and was a party to the crime pursuant to O.C.G.A. § 16-2-20(a) and (b)(3); the evidence showed that the defendant participated and intentionally aided in the commission of the drug trafficking offense by driving the codefendants and the cocaine to the pre-arranged location for the transaction, warning the codefendants that the principal agent was a police officer and taking possession of the funds used for the transaction. *Valdez v. State*, 310 Ga. App. 274, 712 S.E.2d 656 (2011).

Defendant's conviction for trafficking in cocaine, in violation of O.C.G.A. § 16-13-31(a)(1), was supported by sufficient evidence under O.C.G.A. §§ 16-2-20(b)(3) and 24-4-8 since the defendant and the co-defendant had both made statements regarding the defendant's involvement in the criminal activity, and the police observed defendant's actions; there was evidence that the defendant was an active participant and a party to the trafficking offense. *Martinez v. State*, No. A11A2066, 2012 Ga. App. LEXIS 232 (Mar. 2, 2012).

Delivery and distribution of marijuana.

Evidence that a defendant participated in a plan for the delivery of a package containing 12 pounds of marijuana to a residence, along with digital scales, a marijuana grinder, and plastic baggies at the residence, and the defendant's admission that the marijuana was the defendant's, was sufficient to convict the defendant as a party to possession of marijuana with

intent to distribute, trafficking in marijuana, and possession of marijuana, pursuant to O.C.G.A. § 16-2-20. *Salinas v. State*, 313 Ga. App. 720, 722 S.E.2d 432 (2012).

Witness was not accomplice in drug transaction. — Defendant's convictions were not based on insufficient evidence when a witness gave uncorroborated testimony because the witness was not the defendant's accomplice as: (1) the defendant only asked the witness how to make a fake brick of cocaine; and (2) nothing showed the witness advised, encouraged, or counseled the defendant to commit a crime, under O.C.G.A. § 16-2-20(b)(4), or that the witness intended to participate in a crime. *Williams v. State*, 289 Ga. 672, 715 S.E.2d 76 (2011).

Jury instructions misstated law of party to a crime for marijuana possession. — Trial court's instructions on "mere association" and "mere presence" with regard to charging a defendant as a party to a crime under O.C.G.A. § 16-2-20(a) were misstatements of the law and also directly conflicted with other closely related instructions, and were harmful error requiring reversal of the defendant's convictions for possession of marijuana with intent to distribute in violation of O.C.G.A. § 16-13-30(j)(1). *Able v. State*, 312 Ga. App. 252, 718 S.E.2d 96 (2011).

4. Murder or Manslaughter

Party to murder.

State proved that the defendant possessed the intent required to commit the predicate aggravated assault and conspiracy felonies for the felony murder conviction because evidence was sufficient to authorize a rational jury to conclude that the defendant, with a coparty and coconspirator, intended to rob the victim using a deadly weapon, that the victim was reasonably apprehensive of receiving a violent injury as a result of their intentional acts, and that the defendant was guilty beyond a reasonable doubt as a party to the crimes for which the defendant was convicted pursuant to O.C.G.A. § 16-2-2. *Johnson v. State*, 289 Ga. 498, 713 S.E.2d 376 (2011).

6. Property Offenses

Evidence sufficient to support robbery conviction.

Trial court did not err in finding that similar transaction evidence was relevant and admissible because the evidence showed that the defendant was involved in the planning and/or execution of each of the similar transactions pursuant to O.C.G.A. § 16-2-20, even if the defendant was not the actual perpetrator of the crime; given that the defendant was identified as an active participant in individual crimes that were part of this continuing criminal enterprise, and that the defendant's possession of a ring stolen from a car salesperson further demonstrated the involvement in the crime spree, the jury was authorized to find that the defendant committed the independent offenses or acts as either an actual perpetrator or as a party to the crimes. *Walker v. State*, 310 Ga. App. 223, 713 S.E.2d 413 (2011).

Party to armed robbery.

Evidence was sufficient to support the defendant's conviction for armed robbery because an accomplice testified to committing a series of armed robberies and that the defendant had participated by selecting the stores to rob, supplying the gun, acting as the getaway driver, and receiving part of the stolen money; law enforce-

ment officers testified that the accomplice implicated the defendant during an interrogation, and officers found items of clothing matching those worn by the armed robber in the defendant's hotel room. *Williams v. State*, No. A11A1662, 2012 Ga. App. LEXIS 183 (Feb. 23, 2012).

Party to the crime of entering an automobile with intent to commit theft. — Evidence was sufficient to convict a defendant of theft in violation of O.C.G.A. § 16-8-18 as a party to the crime under O.C.G.A. § 16-2-20, given that the defendant drove the defendant's truck to a pharmacy, waited with the truck idling while the defendant's friend got out, smashed a car window, and stole a purse, then drove away with the friend and hid the friend at the defendant's apartment when the police came. *Rinks v. State*, 313 Ga. App. 37, 718 S.E.2d 359 (2011).

Evidence insufficient to support conviction of theft by taking.

Jury was authorized to find from the evidence that the defendant was guilty beyond a reasonable doubt of theft by taking, O.C.G.A. § 16-8-2, as a party to the crime under O.C.G.A. § 16-2-20 because evidence that another house cleaner could have taken the money would not necessarily have precluded a finding of the defendant's guilt. *Cookston v. State*, 309 Ga. App. 708, 710 S.E.2d 900 (2011).

16-2-21. Prosecution of parties who did not directly commit the crime.

JUDICIAL DECISIONS

Jury instruction supported by evidence.

There was slight evidence to justify a charge as to parties to the crime as two or more persons could have been involved; it was possible that the defendant acted with an accomplice who fled the scene in a yellow car, while the defendant fled the scene in a green car, because several witnesses claimed to have seen the robber leave in a yellow car, and other witnesses said the perpetrator got into a green car. *Williams v. State*, 312 Ga. App. 22, 717 S.E.2d 532 (2011).

Evidence sufficient to support conviction.

Trial court did not err in finding that the defendant was a party to the crime because there was ample evidence, based upon the defendant's actions and the defendant's presence, companionship, conduct, and demeanor before, during, and after the commission of the crime, to conclude that the defendant was more than "merely present" during the commission of the crimes; while in a car with the victim and companions, the front-seat passenger pulled out a gun and shot the victim, and

during the incident, the defendant did not say or do anything to intervene. *Cook v. State*, 314 Ga. App. 289, 723 S.E.2d 709 (2012).

Jury was authorized to find that the defendant was a party to the codefendant's crime of cruelty to children in the first degree in violation of O.C.G.A. §§ 16-2-20 and 16-5-70(b) because the victim's testimony showed that the defen-

dant was present during the codefendant's beating of the victim yet did nothing to stop the codefendant or otherwise help the victim; there was also evidence that the defendant was not only aware of prior abuse that the victim sustained via a belt but had also participated in such prior abuse. *Tabb v. State*, 313 Ga. App. 852, 723 S.E.2d 295 (2012).

16-2-22. Criminal responsibility of corporations.

JUDICIAL DECISIONS

Liability for theft. — Corporation could only be criminally liable for theft in Georgia pursuant to O.C.G.A. § 16-2-22(a)(2) for crimes by an officer or official who was acting within the scope of his employment on behalf of the corporation, as the applica-

ble theft statutes did not contain language that clearly indicated a legislative purpose to impose liability on a corporation. *Schroerlucke v. United States*, 100 Fed. Cl. 584 (Fed. Cl. 2011).

CHAPTER 3

DEFENSES TO CRIMINAL PROSECUTIONS

ARTICLE 1

RESPONSIBILITY

16-3-2. Mental capacity; insanity.

JUDICIAL DECISIONS

ANALYSIS

APPLICATION

Application

Jury charges correctly stating law.

Instruction on self-defense did not result in reversible error because the trial court fully and adequately charged and recharged on the issue of self-defense, including the statutory language “reasonably believes” in O.C.G.A. § 16-3-21(a), and on the state’s burden to prove beyond a reasonable doubt that the defendant was not justified. *Hill v. State*, 290 Ga. 493, 722 S.E.2d 708 (2012).

Defendant failed to prove insanity at the time of the crime.

There was evidence from which a rational trier of fact could have found that the defendant failed to prove by a preponderance of the evidence that the defendant was insane at the time of the crime because the state presented the testimony of a forensic psychologist that the defendant’s efforts to clean up the blood and hide the body indicated that the defendant knew the wrongfulness of the defendant’s actions, that the defendant’s state-

ment to police that the defendant acted in self-defense was a rational motive for the defendant's escalating fight with the victim, and that there was no evidence that the defendant was delusional at the time of the crimes. *Alvelo v. State*, 290 Ga. 609, 724 S.E.2d 377 (2012).

Because the defendant failed to present any evidence from which a jury could conclude that the defendant did not know right from wrong when the defendant committed the criminal acts, the trial court did not err in declining to charge the jury pursuant to O.C.G.A. § 17-7-131(b)(1)(C) that the defendant could be found not guilty by reason of insanity under O.C.G.A. § 16-3-2; the defendant introduced no evidence of insanity, only lay witness testimony about generalized problems. *McBride v. State*, No. A11A1734, 2012 Ga. App. LEXIS 272 (Mar. 12, 2012).

16-3-3. Delusional compulsion.

JUDICIAL DECISIONS

ANALYSIS

APPLICATION

Application

Defendant failed to prove insanity at the time of the crime.

There was evidence from which a rational trier of fact could have found that the defendant failed to prove by a preponderance of the evidence that the defendant was insane at the time of the crime because the state presented the testimony of a forensic psychologist that the defen-

Failure to plead insanity defense.

— Defendant was properly convicted of terroristic threats in violation of O.C.G.A. § 16-11-37(a) because the jury was presented with sufficient evidence by which to find that the defendant intended to terrorize officers by communicating a threat to blow up the defendant's home using propane; although there was testimony that the defendant suffered from a history of mental illness, the defendant did not plead the affirmative defense of insanity, and the issue of the defendant's criminal intent was a question of fact for the jury, which was presented with sufficient evidence to establish the requisite criminal intent. *Layne v. State*, 313 Ga. App. 608, 722 S.E.2d 351 (2012).

dant's efforts to clean up the blood and hide the body indicated that the defendant knew the wrongfulness of the defendant's actions, that the defendant's statement to police that the defendant acted in self-defense was a rational motive for the defendant's escalating fight with the victim, and that there was no evidence that the defendant was delusional at the time of the crimes. *Alvelo v. State*, 290 Ga. 609, 724 S.E.2d 377 (2012).

16-3-5. Mistake of fact.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

JURY INSTRUCTIONS

General Consideration

Defendant's belief did not constitute mistake of fact. — Defendant's belief that the victim was not in the trajectory of the bullet when the defendant intentionally fired the weapon at a third party does not constitute the type of mis-

take of fact that would serve as a defense to malice murder or other crimes. *Allen v. State*, 290 Ga. 743, 723 S.E.2d 684 (2012).

Jury Instructions

Charge on mistake of fact warranted. — Because a defendant's evi-

dence that the defendant acted under a misapprehension of fact in entering a house would have authorized the jury to acquit the defendant of burglary under O.C.G.A. § 16-7-1(a), and because the charge that was given did not properly inform the jury about the true nature of the defendant's affirmative defense, the defendant was entitled to a charge on mistake of fact under O.C.G.A. § 16-3-5. *Price v. State*, 289 Ga. 459, 712 S.E.2d 828 (2011).

Trial court did not err in refusing to charge mistake of fact, etc.

Trial court did not err in failing to charge the jury on the defense of mistake of fact under O.C.G.A. § 16-3-5 as to the burglary counts of the indictment because the fact that the defendant could have thought that someone lived in the home did not constitute the type of mistake of

fact that would serve as a defense to the defendant's unauthorized entry into the home since the evidence was uncontroverted that the defendant was not invited into the home. *Boatright v. State*, 289 Ga. 597, 713 S.E.2d 829 (2011).

Trial court did not err by failing to give the defendant's requested jury charge on the defense of mistake of fact, pursuant to O.C.G.A. § 16-3-5, because the charge was not authorized by the evidence as the evidence did not show that the defendant was working as a confidential informant at the time when drugs were found in an inventory search of the defendant's vehicle before the impoundment of the vehicle for the defendant not having a driver's license and insurance for the vehicle. *Ahmad v. State*, 312 Ga. App. 703, 719 S.E.2d 563 (2011).

16-3-6. Affirmative defenses to certain sexual crimes.

Law reviews. — For article on the 2011 enactment of this Code section, see 28 Ga. St. U. L. Rev. 131 (2011). For

article, "Crimes and Offenses: Crimes Against the Person," see 28 Ga. St. U. L. Rev. 131 (2011).

ARTICLE 2

JUSTIFICATION AND EXCUSE

16-3-20. Justification.

JUDICIAL DECISIONS

ANALYSIS

JURY INSTRUCTION

Jury Instruction

Ineffective assistance not found.

Trial counsel was not ineffective for failing to object to the trial court's jury charge on justifiable parental discipline, O.C.G.A. § 16-3-20(3), because the trial court was authorized to give a justifiable parental discipline jury charge that was

adequately adjusted to the evidence in the case; because it was for the jury to decide whether or not the codefendant's conduct caused the victim to suffer cruel or excessive physical pain, any objection to the trial court's jury charge on justifiable parental discipline would have lacked merit. *Tabb v. State*, 313 Ga. App. 852, 723 S.E.2d 295 (2012).

16-3-21. Use of force in defense of self or others; evidence of belief that force was necessary in murder or manslaughter prosecution.

JUDICIAL DECISIONS

ANALYSIS

FEAR OF REASONABLE MAN

JURY CHARGE

1. IN GENERAL
2. CONTENT

APPLICATION

Fear of Reasonable Man

Evidence of defendant's state of mind. — Trial court's exclusion of evidence of a defendant's state of mind when the defendant shot a victim was error under O.C.G.A. § 24-3-2, which was harmful in the defendant's criminal trial; the evidence was not hearsay, and was relevant to show the reasonableness of the defendant's state of mind for supporting a justification defense under O.C.G.A. § 16-3-21. *Hodges v. State*, 311 Ga. App. 46, 714 S.E.2d 717 (2011).

Jury Charge

1. In General

Self-defense instruction not warranted.

Trial court did not err by failing to charge the jury on the defense of justification under O.C.G.A. § 16-3-21(a) because the evidence did not support the giving of the charge; there was no evidence presented at trial that the victim's act of opening the front door was in any way an unlawful entry into or attack upon the victim's mother's house, that the victim opened the door in a violent and tumultuous manner, or that the defendant could have reasonably believed that the victim intended to attack or offer personal violence toward anyone inside the house. *Reese v. State*, 289 Ga. 446, 711 S.E.2d 717 (2011).

Charging language of Code section sufficient.

Trial court did not err in charging the jury on self-defense in the language of O.C.G.A. § 16-3-21(b)(3) because assuming that there was no evidence that the

defendant was the aggressor, the charge was at most merely irrelevant, being one of a number of stated exceptions to the rule concerning the use of force in self-defense. *Neal v. State*, 290 Ga. 563, 722 S.E.2d 765 (2012).

Lack of evidence to support jury charge on justification.

Defendant's counsel was not ineffective for failing to request jury charges on the excessive use of force or on lack of justification under O.C.G.A. § 16-3-21(b)(1) and (b)(3) because two corrections officers did not use excessive force as a matter of law in subduing the defendant when, while incarcerated in a county jail, the defendant took two dinner trays, refused to put one back, and fought and choked an officer who took the trays away. *Williams v. State*, 309 Ga. App. 688, 710 S.E.2d 884 (2011).

Trial court did not err by failing to charge the jury on the defense of justification under O.C.G.A. § 16-3-21(a) because the requested charge, which contrasted justification, voluntary manslaughter, and murder, was an inaccurate statement of the law; the definition of "justifiable homicide" contained in the defendant's request was inconsistent with and had been superseded by the current statutory scheme for the affirmative offense of justification; the existence of "reasonable fears" is irrelevant to the consideration of voluntary manslaughter. *Reese v. State*, 289 Ga. 446, 711 S.E.2d 717 (2011).

Lack of evidence to support jury charge on justification. — Trial court did not err by failing to charge the jury on the defense of justification under O.C.G.A. §§ 16-3-21(a) and 16-3-23 because coun-

sel for the defendant characterized the defense as an “imperfect self-defense,” a form of voluntary manslaughter that was not recognized in Georgia. *Reese v. State*, 289 Ga. 446, 711 S.E.2d 717 (2011).

Charge on mutual combat not adjusted to the evidence. — Trial court’s refusal to give the defendant’s requested jury instruction on mutual combat, O.C.G.A. § 16-3-21(b)(3), did not constitute plain error under O.C.G.A. § 17-8-58(b) because a charge on mutual combat was not adjusted to the evidence; there was no evidence of intent to engage in a mutual fight or combat by agreement. *Carruth v. State*, 290 Ga. 342, 721 S.E.2d 80 (2012).

Trial counsel not ineffective.

Because there was no evidence to support a justification defense pursuant to O.C.G.A. § 16-3-21(a), including defense of habitation under O.C.G.A. § 16-3-23, trial counsel’s performance could not be considered deficient for failure to pursue those defenses. *Reese v. State*, 289 Ga. 446, 711 S.E.2d 717 (2011).

2. Content

Defense entitled to jury charge as to retreat.

Trial court committed reversible error in failing to charge the jury on the lack of a duty to retreat under O.C.G.A. § 16-3-23.1 because self-defense, O.C.G.A. § 16-3-21(a), was the defendant’s sole defense, and the issue of retreat was squarely placed in issue by the prosecutor’s cross-examination of the defendant, by the defendant’s explanation of why the defendant did not drive away from the victim, whom the defendant characterized as the aggressor, and by the prosecutor’s closing argument; the evidence of the defendant’s guilt was not overwhelming, given that the case turned solely on the credibility of the defendant, the victim, and the other witnesses. *Hill v. State*, 310 Ga. App. 695, 713 S.E.2d 891 (2011).

Charge fairly represented issue of justification. — Trial court did not err in failing to include certain language in the court’s charge on justification because the charge as a whole fairly represented the issue of justification; inasmuch as the

charge as a whole was not an incorrect statement of the law, and the charge instructed the jury that the defendant was justified in using self defense against the “imminent use of unlawful force and against great bodily injury”, the trial court’s omission of the phrase “or to prevent the commission of a forcible felony” did not undermine the legal adequacy of the charge. *Milnavicius v. State*, 290 Ga. 374, 721 S.E.2d 843 (2012).

Jury instruction based on domestic violence report statute was error. — Jury charge based on O.C.G.A. § 17-4-20.1(a) and (b) was not supported by the evidence because only one of the two parties involved in a domestic dispute reported the incident to law enforcement, and the error was not harmless because it could have led the jury to conclude that the defendant, who was arrested, was the primary aggressor, and undermined the defense of self-defense, which was not permitted under O.C.G.A. § 16-3-21 if the defendant was the aggressor. *Dean v. State*, 313 Ga. App. 726, 722 S.E.2d 436 (2012).

Application

Evidence authorized jury to believe that the defendant did not act in self-defense.

Evidence was sufficient to support the defendant’s conviction for voluntary manslaughter because the defendant’s testimony that the initial shot to the victim’s head was an accident and that the defendant kept shooting because the victim threatened to kill the defendant was sufficient to allow the jury to conclude beyond a reasonable doubt that the defendant did not justifiably use deadly force to protect oneself, after the victim already had been shot in the head, from the victim’s assault pursuant to O.C.G.A. § 16-3-21(a); or the jury simply could have disbelieved the defendant’s claim of self-defense, given the number of gunshots fired. *Davis v. State*, 309 Ga. App. 831, 711 S.E.2d 324 (2011).

Evidence was sufficient to enable the jury to find beyond a reasonable doubt that the defendant did not act in self-defense under O.C.G.A. § 16-3-21(a) because, even if the jury accepted the

defendant's version of events preceding the shooting of the two victims, the jury was authorized to conclude that, having wrestled control of one of the victim's gun, the defendant used excessive force in shooting the two unarmed victims and/or in continuing to fire at the victims after the victims had fallen to the ground. *Jimmerson v. State*, 289 Ga. 364, 711 S.E.2d 660 (2011).

Rational jury could find the defendant guilty beyond a reasonable doubt of aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2) because the evidence was sufficient for the jury to conclude beyond a reasonable doubt that the state disproved the defendant's self-defense claim; the jury was entitled to reject the defendant's version of events, and even if the jury found that the victim threw a bottle at the defendant's car, the jury could have concluded that the defendant struck the victim after any danger had passed and that the defendant's response was excessive. *Hill v. State*, 310 Ga. App. 695, 713 S.E.2d 891 (2011).

Trial court did not err in refusing to grant the defendant's motion for a new trial under O.C.G.A. § 5-5-21 because the evidence establishing that the defendant and the victims engaged in a heated

argument, which escalated to preparations for a physical altercation, was sufficient to sustain the defendant's voluntary manslaughter conviction, O.C.G.A. § 16-5-2(a); given the heated exchange and the defendant's belief that the defendant was in serious danger, there was sufficient provocation to excite the passion necessary for voluntary manslaughter, and the jury was authorized to reject the defendant's claim of self-defense under O.C.G.A. § 16-3-21(a) and conclude that the defendant was so influenced and excited that the defendant reacted passionately, rather simply in self defense, when the defendant shot an unarmed victim. *White v. State*, 312 Ga. App. 421, 718 S.E.2d 335 (2011).

Evidence of justification.

As defendant showed a threat of force from the victim and reasonably believed that the defendant needed to defend oneself from a violent attack by the victim that could have caused the defendant great bodily injury, the defendant was justified in using deadly force against the victim to protect the defendant under O.C.G.A. § 16-3-21; consequently, the defendant was immune from prosecution under O.C.G.A. § 16-3-24.2. *State v. Green*, 289 Ga. 802, 716 S.E.2d 194 (2011).

16-3-23. Use of force in defense of habitation.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Jury charge on defense of habitation.

Trial court did not err by failing to charge the jury on the defense of justification under O.C.G.A. §§ 16-3-21(a) and 16-3-23 because counsel for the defendant characterized the defense as an "imperfect self-defense," a form of voluntary manslaughter that was not recognized in Georgia. *Reese v. State*, 289 Ga. 446, 711 S.E.2d 717 (2011).

Trial court did not err by giving the jury the defendant's request to charge

on the defense of habitation under O.C.G.A. § 16-3-23 because the evidence that the victim was intoxicated and had cursed at the defendant earlier that evening simply did not meet the statutory standard; there was no evidence presented at trial that the victim's act of opening the front door was in any way an unlawful entry into or attack upon the victim's mother's house, that the victim opened the door in a violent and tumultuous manner, or that the defendant could have reasonably believed that the victim intended to attack or offer personal violence toward anyone inside the house.

Reese v. State, 289 Ga. 446, 711 S.E.2d 717 (2011).

Trial counsel was not ineffective for failing to request a jury charge on the defense of habitation under O.C.G.A. § 16-3-23(1) because there was no basis for an instruction on defense of habitation; the jury was charged on the law of self-defense, but rejected that defense, and the defendant did not establish how a jury charge on the defense of habitation would have raised a reasonable probability that the outcome of the case would have been different. Hill v. State, 290 Ga. 493, 722 S.E.2d 708 (2012).

Counsel was not ineffective for failing to present defense.

Because there was no evidence to support a justification defense pursuant to O.C.G.A. § 16-3-21(a), including defense of habitation under O.C.G.A. § 16-3-23, trial counsel's performance could not be

considered deficient for failure to pursue those defenses. Reese v. State, 289 Ga. 446, 711 S.E.2d 717 (2011).

Trial court did not err in denying the defendant's motion for new trial on the ground of ineffective assistance of counsel because there was no evidence to support an instruction on defense of habitation pursuant to O.C.G.A. § 16-3-23 and, thus, trial counsel did not perform deficiently in failing to request such an instruction; there was no evidence that the victim was attempting to unlawfully enter or attack the defendant's vehicle at the time the defendant stabbed the victim, and under the facts, there could be no reasonable belief that stabbing the victim was necessary to prevent or terminate the other's unlawful entry into or attack upon a motor vehicle. Philpot v. State, 311 Ga. App. 486, 716 S.E.2d 551 (2011).

16-3-23.1. No duty to retreat prior to use of force in self-defense.

JUDICIAL DECISIONS

Reversible error in failing to charge jury on lack of duty to retreat.

— Trial court committed reversible error in failing to charge the jury on the lack of a duty to retreat under O.C.G.A. § 16-3-23.1 because self-defense, O.C.G.A. § 16-3-21(a), was the defendant's sole defense, and the issue of retreat was squarely placed in issue by the prosecutor's cross-examination of the defendant, by the defendant's explanation of

why the defendant did not drive away from the victim, whom the defendant characterized as the aggressor, and by the prosecutor's closing argument; the evidence of the defendant's guilt was not overwhelming, given that the case turned solely on the credibility of the defendant, the victim, and the other witnesses. Hill v. State, 310 Ga. App. 695, 713 S.E.2d 891 (2011).

16-3-24.2. Immunity from prosecution; exception.

JUDICIAL DECISIONS

Immunity properly found.

As defendant showed a threat of force from the victim and reasonably believed that the defendant needed to defend oneself from a violent attack by the victim that could have caused the defendant great bodily injury, the defendant was

justified in using deadly force against the victim to protect the defendant under O.C.G.A. § 16-3-21; consequently, the defendant was immune from prosecution under O.C.G.A. § 16-3-24.2. State v. Green, 289 Ga. 802, 716 S.E.2d 194 (2011).

16-3-25. Entrapment.

JUDICIAL DECISIONS

ANALYSIS

JURY CHARGE

Jury Charge

Charging jury in language of law.
Counsel’s failure to object to the denial of counsel’s request to instruct a jury on the definition of “incitement” in the con-

text of an entrapment instruction was not ineffective assistance because “incitement,” as used in O.C.G.A. § 16-3-25, was a term of common knowledge. *Millsaps v. State*, 310 Ga. App. 769, 714 S.E.2d 661 (2011).

16-3-26. Coercion.

JUDICIAL DECISIONS

Coercion is no defense, etc.
Trial court did not err by refusing to charge the jury on the defense of coercion under O.C.G.A. § 16-3-26 because the threat of violence to the defendant from a co-defendant did not occur during the crimes but while they were driving to the scene of the robbery. Additionally, the

co-defendant walked off for a period of time prior to the crimes and the defendant could have left the scene but did not. *Calmes v. State*, 312 Ga. App. 769, 719 S.E.2d 516 (2011), cert. denied, No. S12C0538, 2012 Ga. LEXIS 324 (Ga. 2012).

CHAPTER 4

CRIMINAL ATTEMPT, CONSPIRACY, AND SOLICITATION

16-4-1. Criminal attempt.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
APPLICATION

General Consideration

Effective assistance of counsel in attempted rape trial. — Defendant was not prejudiced by trial counsel’s failure to object to testimony speculating as to the defendant’s state of mind because there was no reasonable likelihood that the testimony contributed to the guilty verdict on the lesser charge of attempted rape; the testimony regarding the victim’s belief as

to why the defendant was following the van in which the victim was traveling was not relevant to the consideration of the charges against the defendant, rape or attempted rape. *Gomez-Oliva v. State*, 312 Ga. App. 105, 717 S.E.2d 689 (2011).

Application

Sexual offenses with minors initiated over the Internet.

When the defendant was charged with

using the Internet to seduce, solicit, lure, or entice a child or a person believed to be a child to commit an illegal sex act, under O.C.G.A. § 16-12-100.2(d)(1), attempted aggravated child molestation, under O.C.G.A. §§ 16-4-1 and 16-6-4(c), and attempted child molestation, under O.C.G.A. §§ 16-4-1 and 16-6-4(a), it was not error to deny the defendant's motion for a directed verdict of acquittal, based on entrapment, because the jury's determination that entrapment did not occur was supported by evidence that: (1) the defendant continued communicating with a person the defendant believed to be 14 years old, including having sexually explicit conversations with the person in which the defendant stated the defendant wanted "a lot of oral," after the defendant learned that the person was 14 years old; (2) the defendant discussed with the person how the person could meet the defendant if the person could not drive, inquired whether the person had ever snuck away from home before, and stated that the defendant believed the union would be legal if the defendant were 16 years old, instead of the defendant's actual age; (3) the defendant left the defendant's home of Tennessee to meet a purportedly 14-year-old girl in order to have sex with the person, which the defendant admitted in the defendant's statements to officers; and (4) the defendant brought condoms with the defendant, which the defendant stated were to prevent any "accidents" in the event the defendant was able to have sex with the person. *Millsaps v. State*, 310 Ga. App. 769, 714 S.E.2d 661 (2011).

Attempt to enter an automobile did not merge with loitering. — Merging of sentences for attempt to enter an automobile in violation of O.C.G.A. §§ 16-4-1 and 16-8-18, and loitering under O.C.G.A. § 16-11-36, was not warranted because loitering required proof of presence in a place at a time or in a manner not usual for law-abiding individuals, and attempt to enter an automobile required performance of an act which constituted a substantial step toward the commission of entering an automobile, both elements not required by the other crime. *Brown v. State*, 312 Ga. App. 489, 718 S.E.2d 847 (2011).

Criminal attempt to commit theft from vehicle.

Defendant's act of repeatedly pulling at a vehicle's door handle in a sorority house parking lot at 2:00 a.m. amounted to more than a mere preparatory act, and was instead an act proximately leading to the consummation of the crime of entering an automobile, supporting the defendant's conviction for attempt to enter an automobile in violation of O.C.G.A. §§ 16-4-1 and 16-8-18. *Brown v. State*, 312 Ga. App. 489, 718 S.E.2d 847 (2011).

Attempt to hijack a motor vehicle.

— Given that a defendant repeatedly stabbed a victim in the throat in a parking lot to attempt to force the victim to get inside the victim's car, the trial court could find that the defendant rejected the car keys when the victim offered the keys because the defendant intended to abscond with both the car and the victim as needed to prove attempted hijacking of a motor vehicle under O.C.G.A. §§ 16-4-1 and 16-5-44.1(b). *Hickman v. State*, 311 Ga. App. 544, 716 S.E.2d 597 (2011).

Similar transaction evidence admissible. — Based on the defendant's position that the defendant was not involved with a methamphetamine laboratory, as well as the similarity of the defendant's prior drug crime with criminal attempt to manufacture methamphetamine, the trial court did not abuse the court's discretion in admitting the evidence of the defendant's prior attempts to manufacture methamphetamine for the purpose of showing the defendant's bent of mind and course of conduct; the trial court was authorized to find that the probative value of the similar transaction evidence outweighed its prejudicial effect, and the trial court provided jury instructions that limited consideration of the similar transaction evidence to the appropriate purposes and provided guidance so as to diminish its prejudicial impact. *Newton v. State*, 313 Ga. App. 889, 723 S.E.2d 95 (2012).

Trial court did not abuse the court's discretion in admitting evidence of the defendant's prior attempts to manufacture methamphetamine because the state needed the evidence of the defendant's prior drug conviction to show the defen-

dant's bent of mind and course of conduct with respect to the methamphetamine offense at issue, criminal attempt to manufacture methamphetamine in violation of O.C.G.A. §§ 16-4-1 and 16-13-30(b); the defendant disclaimed any involvement with or knowledge of a methamphetamine laboratory. *Newton v. State*, 313 Ga. App. 889, 723 S.E.2d 95 (2012).

Evidence held sufficient.

Evidence was sufficient to support the defendant's conviction for attempted rape in violation of O.C.G.A. §§ 16-4-1 and 16-6-1(a)(1) because the victim's testimony as to the defendant forcing his penis into her vagina against her will sufficed to sustain the attempted rape conviction. *Gomez-Oliva v. State*, 312 Ga. App. 105, 717 S.E.2d 689 (2011).

Evidence was sufficient for a rational trier of fact to find the defendant guilty beyond a reasonable doubt of aggravated assault and attempted rape because under the circumstances the jury was autho-

rized to conclude that the defendant's actions, although circumstantial insofar as intent was concerned, provided sufficient evidence to establish that the defendant attempted to rape the victim; the defendant knocked the victim down and attempted to pull the victim into an isolated vacant lot and continued to do so despite the victim's struggles and attempted escape. *Wright v. State*, 314 Ga. App. 353, 723 S.E.2d 737 (2012).

Conviction for attempted rape and aggravated assault. — Defendant's conviction for aggravated assault with intent to rape under O.C.G.A. § 16-5-21(a)(1) merged into the defendant's conviction for attempted rape under O.C.G.A. §§ 16-4-1 (criminal attempt) and 16-6-1 (rape) because the same evidence supported both convictions and, therefore, the aggravated assault conviction was vacated. *Smith v. State*, 313 Ga. App. 170, 721 S.E.2d 165 (2011).

16-4-6. Penalties for criminal attempt.

JUDICIAL DECISIONS

Application of rule of lenity. — Because attempted murder and aggravated assault were felonies under O.C.G.A. §§ 16-4-6(a) and 16-5-21(j), and because first- and third-degree cruelty to children could not be proven by the same evidence

under O.C.G.A. § 16-5-70(b) and (d)(2), the rule of lenity did not apply; therefore, the trial court properly denied the defendant's motion for a new trial. *Rollf v. State*, No. A11A2042, 2012 Ga. App. LEXIS 242 (Mar. 5, 2012).

16-4-8. Conspiracy to commit a crime.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

WHAT CONSTITUTES CONSPIRACY

JURY CHARGE

General Consideration

Theft by receiving stolen property. — Evidence was sufficient to sustain the codefendants' convictions for theft by receiving stolen property and conspiracy to commit theft by receiving stolen property since the testimony was sufficient to show that items of value, owned by someone

other than the codefendants, were recovered from a warehouse over which the codefendants had control. A witness's misstatements concerning the specific address of the warehouse did not render the evidence insufficient as to the location from where the stolen property was recovered. *Robinson v. State*, 312 Ga. App. 736, 719 S.E.2d 601 (2011).

Conspiracy as underlying felony. — State proved that the defendant possessed the intent required to commit the predicate aggravated assault and conspiracy felonies for the felony murder conviction because evidence was sufficient to authorize a rational jury to conclude that the defendant, with a coparty and coconspirator, intended to rob the victim using a deadly weapon, that the victim was reasonably apprehensive of receiving a violent injury as a result of their intentional acts, and that the defendant was guilty beyond a reasonable doubt as a party to the crimes for which the defendant was convicted pursuant to O.C.G.A. § 16-2-2. *Johnson v. State*, 289 Ga. 498, 713 S.E.2d 376 (2011).

What Constitutes Conspiracy

Conspiracy to commit armed robbery. — Evidence was sufficient to support the defendant's conviction for conspiracy to commit armed robbery because evidence was presented that the defendant and a co-defendant entered a restaurant to rob the restaurant and shot two employees of the restaurant. In a statement to the police, the defendant admitted that the defendant entered the restaurant with a handgun to rob the restaurant, but the defendant claimed that the defendant heard gunshots and left the restaurant, while the co-defendant gave a similar statement to the police.

Watkins v. State, 289 Ga. 359, 711 S.E.2d 655 (2011).

Drug trafficking.

Evidence was sufficient to sustain the defendant's conviction for conspiracy to traffic methamphetamine over 400 grams in violation of O.C.G.A. §§ 16-4-8 and 16-13-31(e)(3) because an accomplice testified that the defendant supplied the accomplice with several pounds of methamphetamine, and that testimony was amply corroborated by other evidence in the record; the defendant's translator testified that the translator retrieved \$15,000 from the accomplice as payment for fronted methamphetamine, police officers recovered \$15,000 in cash from the translator upon leaving the accomplice's residence, and there were recorded conversations between the accomplice, the defendant, and the translator in which they discussed methamphetamine transactions. *Melesa v. State*, 314 Ga. App. 306, 724 S.E.2d 30 (2012).

Jury Charge

Limiting instruction required. — Reversal of a conviction for conspiracy to violate the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq., through a violation of O.C.G.A. § 16-13-30(j)(1), was required because the trial court failed to provide any limiting instruction informing jurors that the purchaser and the buyer in a drug transaction could not conspire together. *Darville v. State*, 289 Ga. 698, 715 S.E.2d 110 (2011).

CHAPTER 5

CRIMES AGAINST THE PERSON

Article 1
Homicide

licensing board regarding violation.

Sec.
16-5-5. Assisted suicide; notification of

Cross references. — Exemption from classification of vicious dog for attacks during criminal pursuit, § 4-8-21.

ARTICLE 1

HOMICIDE

16-5-1. Murder; felony murder.

Law reviews. — For article, “State v. Felony Murder,” see 62 Mercer L. Rev. Jackson and the Explosion of Liability for 1335 (2011).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

INDICTMENT

INTENT AND MALICE

1. IN GENERAL

DEFENSES

EVIDENCE OF MALICE

FELONY MURDER

1. IN GENERAL

2. UNDERLYING FELONY

JURY INSTRUCTIONS

MERGER

SENTENCE

APPLICATION

1. IN GENERAL

2. CHILDREN AS VICTIMS

General Consideration

Requirements for accepting guilty plea.

Defendant’s conviction for malice murder, which was based upon a guilty plea, was reversed because the record did not show that the defendant was advised of the right against self-incrimination as required by Boykin; the state did not fulfill the state’s duty to ensure that the defendant’s guilty plea was constitutionally valid, the state apparently did not ensure that the defendant was advised of and had effective representation regarding the right to appeal the conviction, and the state did not litigate the merits of the defendant’s guilty plea in the habeas corpus hearings since the record could have been expanded. *Tyner v. State*, 289 Ga. 592, 714 S.E.2d 577 (2011).

Evidence sufficient to convict. — Evidence was sufficient to support the

first defendant and the second defendant’s convictions for murder, kidnapping, armed robbery, and burglary, as the evidence showed that the defendants were involved in a scheme to rob a person who they believed to be selling large amounts of marijuana from an apartment, that the defendants burst into the apartment brandishing guns, that one of the defendants fatally shot the victim, and that the other defendant forced two people present to lie on the ground and divulge the location of a safe in the apartment that held money and marijuana. *Howard v. State*, 279 Ga. 166, 611 S.E.2d 3 (2005).

Indictment

Indictment alleging shooting sufficiently alleged instrumentality used was firearm. — Defendant, who pled guilty to malice murder, O.C.G.A. § 16-5-1, was not entitled to an

out-of-time appeal based on the indictment’s failure to allege the instrumentality used; the indictment’s allegations that the defendant caused the death of the victim by shooting the victim was sufficient to give notice that the defendant was charged with killing the victim with the use of a firearm. *Brown v. State*, 290 Ga. 321, 720 S.E.2d 617 (2012).

Intent and Malice

1. In General

Prior similar transaction evidence properly admitted to show intent and bent of mind.

Trial court’s determination that the state met the requirements for admission of similar transaction evidence was not an abuse of discretion because evidence that the defendant used violence against an adult with whom the defendant had a close, loving relationship was admissible to show the defendant’s bent of mind in using violence against a member of the defendant’s family, even though the family member was a mere infant, and even though the family member suffered internal, rather than external, injuries. *Brinson v. State*, 289 Ga. 150, 709 S.E.2d 789 (2011).

Defenses

Defendant could not argue justification as a defense, etc.

Trial court did not err by failing to charge the jury on the defense of justification under O.C.G.A. § 16-3-21(a) because the requested charge, which contrasted justification, voluntary manslaughter, and murder, was an inaccurate statement of the law; the definition of “justifiable homicide” contained in the defendant’s request was inconsistent with and had been superceded by the current statutory scheme for the affirmative offense of justification; the existence of “reasonable fears” is irrelevant to the consideration of voluntary manslaughter. *Reese v. State*, 289 Ga. 446, 711 S.E.2d 717 (2011).

Evidence of Malice

Evidence sufficient to support conviction.

Evidence was sufficient to authorize a

rational trier of fact to find the defendant guilty beyond a reasonable doubt of felony murder and possession of a firearm during the commission of a felony because the defendant and a codefendant began shooting across a street at someone, who returned fire, and the victim was an innocent 16-year-old bystander who was killed during the shootout. *Norris v. State*, 289 Ga. 154, 709 S.E.2d 792 (2011).

Evidence was sufficient for a rational trier of fact to find the defendant guilty beyond a reasonable doubt of malice murder, felony murder based on aggravated assault, possession of a firearm during the commission of a crime, and use of a firearm by a convicted felon because the defendant admitted to purposefully putting a gun to the fearful victim’s head and pulling the trigger. *Jones v. State*, 289 Ga. 145, 710 S.E.2d 127 (2011).

Evidence was sufficient for a rational trier of fact to find the defendant guilty beyond a reasonable doubt of felony murder because numerous eyewitnesses saw the defendant fire a gun into a crowd striking the victim, shout expletives, and assert that the defendant was a killer; that the state did not produce certain evidence did not mean that the evidence presented was insufficient to allow a jury to find the defendant guilty of murder. *Glass v. State*, 289 Ga. 542, 712 S.E.2d 851 (2011).

Possession of a stolen automobile was sufficient to support a felony murder conviction because the defendant’s possession of the stolen car played a role in the defendant’s decision to flee the police; the defendant could have believed that the defendant could escape in the stolen car, where the defendant could not have escaped on foot, and the decision to remain in the stolen car in order to flee created a foreseeable risk of death. *Johnson v. State*, 289 Ga. 650, 715 S.E.2d 99 (2011).

Evidence was sufficient to enable a rational trier of fact to find the defendant guilty beyond a reasonable doubt of malice murder, felony murder while in the commission of armed robbery, armed robbery, and conspiracy to violate the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq., through a violation of O.C.G.A. § 16-13-30(j)(1), because: (1) the

defendant and another buyer met with the victim and another seller where the defendant and the other buyer inspected marijuana which the victim and the other seller had for sale; (2) after some discussion about price, the victim told the defendant what the price was and that the defendant could take it or leave it; (3) the defendant said that the defendant would take it, pulled a gun from the defendant's waistband, and fatally shot the victim; and (4) there was conflicting testimony as to whether the defendant took the marijuana and ran away with the marijuana after shooting the victim. *Darville v. State*, 289 Ga. 698, 715 S.E.2d 110 (2011).

Defendant's convictions for armed robbery, aggravated assault, and malice murder were based on sufficient evidence where a victim in an apartment next to the defendant's was fatally stabbed multiple times, there was physical evidence that tied the defendant to the criminal incident, and the defendant confessed to committing the crimes. *Culpepper v. State*, 289 Ga. 736, 715 S.E.2d 155 (2011).

Evidence that the defendant began the conflict, punching the victim shortly before the codefendant began to attack the victim, the defendant stood by and watched as the codefendant mercilessly continued the assault and encouraged the codefendant to "beat the victim's ass," and the defendant drove the codefendant away from the scene was sufficient for the jury to find the defendant guilty beyond a reasonable doubt of murder. *Simmons v. State*, 289 Ga. 773, 716 S.E.2d 165 (2011).

Defendant's convictions of malice murder, armed robbery, and other crimes were not based on the uncorroborated testimony of an accomplice in violation of O.C.G.A. § 24-4-8 as: 1) a victim testified that intruders took a wallet that police later found in the defendant's home; and 2) cell phone tower records established that the defendant and the accomplice were exchanging phone calls during the times when the crimes were committed and within the vicinity of the crime sites. *Jackson v. State*, 289 Ga. 798, 716 S.E.2d 188 (2011).

Because the defendant pointed a gun at the victim while defendant's accomplices robbed the victim, and thereafter shot at

the victim's trailer, hitting a child and killing the victim's sister-in-law, the evidence was sufficient to find defendant guilty of felony murder, aggravated assault, armed robbery, cruelty to children, possession of a gun during the commission of a crime, and possession of a revolver by a person under the age of 18. *Lytle v. State*, 290 Ga. 177, 718 S.E.2d 296 (2011).

Felony Murder

1. In General

Evidence was sufficient to support conviction.

Evidence was sufficient to enable any rational trier of fact to find the defendant guilty beyond a reasonable doubt of felony murder and aggravated battery in connection with the death of a victim, the defendant's infant daughter, because the evidence showed that the defendant was the only person caring for the victim during the relevant time period and that the defendant caused the victim's death. *Brinson v. State*, 289 Ga. 150, 709 S.E.2d 789 (2011).

In a felony murder case, testimony of eyewitnesses, cell phone exchanges between the cell phone in defendant's possession and that of the victim just minutes before the shooting, the identification of a car used by the defendant as the car involved in the crime, and the defendant's statements about the shooting of the victim constituted sufficient evidence to enable a jury to find the defendant guilty beyond a reasonable doubt. *Slaughter v. State*, 289 Ga. 790, 716 S.E.2d 180 (2011).

Instruction on proximate cause in relationship to felony murder. — Trial court did not err in failing to instruct the jury on the law regarding proximate cause and its relationship to felony murder because the omission of additional language concerning proximate cause could not be considered a clear or obvious error under O.C.G.A. § 17-8-58; the jury was instructed that to find the defendant guilty of felony murder while in the commission of felony criminal attempt to possess cocaine, the jury had to find beyond a reasonable doubt that the felony was dangerous per se or, by the attendant circumstances in the case, created a foreseeable

risk of death, and the jury was also instructed that for felony murder to be found, the jury had to find that, in the commission of the underlying felony, the defendant caused the death of another human being irrespective of malice. *Sapp v. State*, 290 Ga. 247, 719 S.E.2d 434 (2011).

2. Underlying Felony

Aggravated assault as underlying felony.

Defendant's conviction for aggravated assault was not authorized because the count of the indictment that alleged aggravated assault had to be merged into the felony murder count; although the felony murder and the underlying felony were committed on different victims, the count of the indictment alleging felony murder set forth the aggravated assault against a victim as the underlying felony supporting the charge of felony murder. *Glass v. State*, 289 Ga. 542, 712 S.E.2d 851 (2011).

State proved that the defendant possessed the intent required to commit the predicate aggravated assault and conspiracy felonies for the felony murder conviction because evidence was sufficient to authorize a rational jury to conclude that the defendant, with a coparty and coconspirator, intended to rob the victim using a deadly weapon, that the victim was reasonably apprehensive of receiving a violent injury as a result of their intentional acts, and that the defendant was guilty beyond a reasonable doubt as a party to the crimes for which the defendant was convicted pursuant to O.C.G.A. § 16-2-2. *Johnson v. State*, 289 Ga. 498, 713 S.E.2d 376 (2011).

Jury was authorized to find that the evidence was sufficient to find the defendant guilty beyond a reasonable doubt of felony murder during the commission of aggravated assault in the manner alleged in the indictment because at trial the medical examiner testified that the cause of the victim's death was suffocation; although the defendant told an ex-spouse over the phone that the defendant choked the victim, there was no other evidence to corroborate that statement while there was much physical and scientific evidence

that pointed to the cause of death as suffocation. *Davis v. State*, 290 Ga. 421, 721 S.E.2d 886 (2012).

Jury Instructions

Charge on transferred intent inappropriate. — Because the charge on transferred intent was not adjusted to the evidence, it was error for the trial court to so instruct the jury, and trial counsel performed deficiently by failing to object to the giving of that charge and the prosecutor's closing argument addressing the inapplicable principles of transferred intent; there was no evidence that the defendant was intending to shoot any other person when the defendant shot the victim so as to bring the case within the typical "innocent bystander" scenario in which the doctrine of transferred intent was applied, but in light of the overwhelming evidence of the defendant's guilt, it was highly probable that the charge did not contribute to the verdict. *Boatright v. State*, 289 Ga. 597, 713 S.E.2d 829 (2011).

No error in recharging jury.

Trial court did not err by defining "malice aforethought" in response to a request from the jury for a recharge because the instruction was based on the pattern charge and was legally correct; given the correct and detailed instructions contained in the trial court's original charge to the jury, it was unlikely that the jury was confused by the recharge, which clearly indicated that premeditation was not an element of the crime. *Dukes v. State*, 290 Ga. 486, 722 S.E.2d 701 (2012).

Charge of mutual combat.

Trial counsel did not perform deficiently by failing to request a charge on mutual combat because there was no evidence of a mutual intention to fight; at trial, the defendant presented the defense of accident and asserted that the defendant lacked any intention to shoot the victim, but there was no evidence reflected that the defendant and the victim mutually agreed to fight each other. *Boatright v. State*, 289 Ga. 597, 713 S.E.2d 829 (2011).

Instruction on voluntary manslaughter not warranted.

Trial court did not err by refusing to charge the jury on voluntary manslaughter

ter because the defendant's testimony that the defendant was not upset but fired a gun out of fear, in self-defense, and in defense of the defendant's parent showed that the defendant did not shoot a child in the heat of passion, and the other evidence was not to the contrary; rather, the testimony of the neighbors, who were the child's parents and the only other trial witnesses present during the shooting demonstrated, at most, that the defendant could have opened fire in response to the neighbors' heated or angry statements, which, as a matter of law, could not constitute "serious provocation" within the meaning of O.C.G.A. § 16-5-2(a). *Davidson v. State*, 289 Ga. 194, 709 S.E.2d 814 (2011).

During the defendant's murder trial, the trial court did not err by denying the defendant's request to charge on the lesser included offense of voluntary manslaughter, O.C.G.A. § 16-5-2, since the defendant testified that the defendant fired a pistol because the defendant was "just scared," and acting out of fear was not the same as acting in the heat of a sudden irresistible passion. *Funes v. State*, 289 Ga. 793, 716 S.E.2d 183 (2011).

Instruction on involuntary manslaughter not warranted.

Trial court did not err by failing to give the defendant's requested charge on the lesser included offense of involuntary manslaughter, O.C.G.A. § 16-5-3, because the defendant's admitted act of purposefully putting a gun to the fearful victim's head and pulling the trigger constituted the felony offense of aggravated assault, O.C.G.A. § 16-5-21, not reckless conduct, O.C.G.A. § 16-5-60(b); the defendant's testimony that the victim began crying when the victim saw the gun provided evidence that the victim perceived the gun to be a loaded weapon that could be used to inflict a violent injury, which was a reasonable perception, and the jury's verdict of guilty on the felony murder charge established the existence of all the elements of the underlying felony offense of aggravated assault. *Jones v. State*, 289 Ga. 145, 710 S.E.2d 127 (2011).

Instruction on nexus between felony and death. — Trial court did not err in charging the jury on the nexus require-

ment between the felony and the death of the victim because the trial court gave the jurors the pattern charge on felony murder at least three times. *Johnson v. State*, 289 Ga. 650, 715 S.E.2d 99 (2011).

Charge of accident not warranted.

— In a prosecution for felony murder and the predicate felonies of aggravated battery, O.C.G.A. § 16-5-24(a), and first-degree child cruelty, O.C.G.A. § 16-5-70, assuming *arguendo* that the evidence supported an instruction on accident, the trial court's failure to give that instruction was not reversible error as the jury's conclusion that the defendant acted with malice, which was supported by overwhelming evidence, necessarily meant that the jury would have rejected any accident defense. *Sears v. State*, 290 Ga. 1, 717 S.E.2d 453 (2011).

Instruction on vehicular homicide.

— Trial court did not err in denying the defendant's request to instruct the jury on vehicular homicide as a lesser-included offense of felony murder because that lesser-included offense was not before the jury; before the case went to the jury, the trial court entered a directed verdict in the defendant's favor on the greater offense of felony murder and, thus, as the jury did not consider the greater offense, it could likewise not consider the lesser included offense for which the defendant had not been indicted. *Johnson v. State*, 289 Ga. 650, 715 S.E.2d 99 (2011).

Merger

Merger of manslaughter conviction.

Trial court properly refused to accept the jury's initial verdict finding the defendant guilty of both felony murder and voluntary manslaughter because the same aggravated assault charge was both the predicate felony for the felony murder charge and the act underlying the voluntary manslaughter charge; therefore, the jury could not find the defendant guilty of both felony murder and voluntary manslaughter because, as charged, the crimes were subject to the modified merger rule, and the first verdicts were ambiguous. *Ingram v. State*, 290 Ga. 500, 722 S.E.2d 714 (2012).

Merger of malice murder and aggravated assault.

Defendant's conviction for aggravated assault should have been merged into a malice murder conviction pursuant to O.C.G.A. § 16-1-7(a)(1), based on the "required evidence" test, as the aggravated assault, as pled, did not require proof of a fact not required to have been proved in the malice murder. *Culpepper v. State*, 289 Ga. 736, 715 S.E.2d 155 (2011).

Defendant's conviction for aggravated assault of the victim merged into the conviction for malice murder of the victim because there was no evidence that the victim suffered a non-fatal injury prior to a deliberate interval in the attack and a fatal injury thereafter; the forensic pathologist who conducted the autopsy catalogued the victim's wounds as "chop injuries" that fractured the victim's skull and incapacitated the victim and were likely inflicted with a hatchet, punctures and superficial, deep, and very deep incisions and stab wounds that were inflicted by knives. *Alvelo v. State*, 290 Ga. 609, 724 S.E.2d 377 (2012).

Merger with armed robbery count.

Defendant's conviction for armed robbery was properly not merged into a malice murder conviction pursuant to O.C.G.A. § 16-1-7(a)(1), based on the "required evidence" test, as each offense required proof of an element that the other did not. *Culpepper v. State*, 289 Ga. 736, 715 S.E.2d 155 (2011).

Underlying conspiracy conviction merged into felony murder conviction. — Defendant's separate conviction for conspiracy was vacated because the conspiracy conviction was the underlying felony that formed the basis for the defendant's felony murder conviction; because the underlying conspiracy merged into the felony murder conviction, the trial court erred in entering a separate judgment of conviction and sentence on the jury's verdict finding the defendant guilty of conspiracy. *Higuera-Hernandez v. State*, 289 Ga. 553, 714 S.E.2d 236 (2011).

Conviction for apprehending criminal and malice murder. — Defendant's conviction for hindering the apprehension of a criminal in violation of O.C.G.A. § 16-10-50 had to be set aside because

defendant could not be convicted for both malice murder and hindering the apprehension of a criminal, which was the equivalent of the common law crime of being an accessory after the fact; a party cannot be convicted both of being a principal to the crime and an accessory after the fact. *Hampton v. State*, 289 Ga. 621, 713 S.E.2d 851 (2011).

Sentence

Two life sentences for murder of single victim.

Defendant's three additional life sentences for felony murder were illegal and could not stand because the trial court erred in failing to sentence the defendant only on the two malice murder counts; the convictions for felony murder were simply surplusage, which should properly have been disposed of by the trial court's sentence of only one life sentence for each of the malice murder counts. *Brown v. State*, 289 Ga. 259, 710 S.E.2d 751 (2011), cert. denied, U.S. , 132 S. Ct. 524, 181 L. Ed. 2d 368 (2011).

Sentence for felony murder and felony criminal attempt to possess cocaine. — Separate judgment of conviction and sentence for criminal attempt to possess cocaine was vacated because after the jury found the defendant guilty of felony murder while in the commission of the felony of criminal attempt to possess cocaine, and also of the felony of criminal attempt to possess cocaine, the defendant was sentenced on each charge, but the defendant could not be sentenced on both felony murder and the underlying felony when found guilty of both. *Sapp v. State*, 290 Ga. 247, 719 S.E.2d 434 (2011).

Application

1. In General

Circumstantial evidence.

Evidence, although circumstantial, was sufficient for a rational trier of fact to reject the defense theory that the victim's death was a suicide and to find the defendant guilty of malice murder beyond a reasonable doubt; the circumstantial evidence was substantial, including not only the nature of the victim's gunshot wound, but also the defendant's motive to harm

the victim, and the defendant's prolonged cover-up and conflicting accounts of the victim's death. *Walden v. State*, 289 Ga. 845, 717 S.E.2d 159 (2011).

Evidence sufficient for murder conviction.

Evidence was sufficient for a rational trier of fact to find the defendant guilty beyond a reasonable doubt of malice murder and possession of a firearm during the commission of a crime because although there were defense witnesses who testified that someone else, and not defendant, was the actual shooter, and there were inconsistencies and contradictions in the testimony of the state's witnesses, the jury, after considering all of the evidence, chose to believe the state's version and that defendant's witnesses were not credible. *Martinez v. State*, 289 Ga. 160, 709 S.E.2d 797 (2011).

Evidence was sufficient to support the defendant's conviction for malice murder because evidence was presented that the defendant and a codefendant entered a restaurant to rob the restaurant and shot two employees of the restaurant. In a statement to the police, the defendant admitted that the defendant entered the restaurant with a handgun to rob the restaurant, but the defendant claimed that the defendant heard gunshots and left the restaurant, while the codefendant gave a similar statement to the police. *Watkins v. State*, 289 Ga. 359, 711 S.E.2d 655 (2011).

Evidence was sufficient to authorize a rational trier of fact to find the defendant guilty beyond a reasonable doubt of malice murder, aggravated assault, and possession of a firearm during the commission of a crime because the three men who were with the victim when the victim was shot identified the defendant as the person who fired shots at them; there was testimony that the defendant was the boyfriend of a woman who was the former girlfriend of one of the three men with the murder victim and that the defendant and the former boyfriend had exchanged heated words earlier the day the victim was killed as well as the afternoon of the day before the shooting. *Glass v. State*, 289 Ga. 706, 715 S.E.2d 85 (2011).

Evidence presented at trial was suffi-

cient to authorize a rational jury to reject the defendant's justification defense and find the defendant guilty of murder beyond a reasonable doubt because the defendant was involved in a pool hall fight, drew a pistol, and opened fire, killing the victim. *Funes v. State*, 289 Ga. 793, 716 S.E.2d 183 (2011).

Evidence was sufficient to support convictions for malice murder because: (1) before the decedent's death, the decedent told a friend that the decedent had been beaten in a fight by one of the defendants; (2) the other defendant placed dozens of calls from the decedent's cell phone as the defendants traveled from Tampa to Atlanta in the decedent's pickup truck; (3) the truck was destroyed in an arson fire near an apartment complex where the defendants were staying with relatives; (4) the decedent's body was found in the bed of the truck; (5) the decedent had been dead for days before the fire; and (6) personal belongings of the decedent were found in the possession of the defendants. *Miller v. State*, 289 Ga. 854, 717 S.E.2d 179 (2011).

Doctor's prescription of controlled substances causing death. — Felony murder conviction was supported by evidence that the defendant illegally provided controlled substances through prescriptions, a dangerous felony, and that the victim's death was a foreseeable result within the meaning of the felony murder statute. *Chua v. State*, 289 Ga. 220, 710 S.E.2d 540 (2011).

2. Children as Victims

Evidence sufficient for murder of infant child.

Trial court did not err in denying the codefendant's motion for a directed verdict of acquittal because the circumstantial evidence the state presented was sufficient to authorize a rational trier of fact to find the codefendant guilty beyond a reasonable doubt of the malice murder of a girlfriend's child; both the girlfriend and the codefendant were with the child during the time period within which the fatal injuries were believed to have been inflicted upon the child. *Smith v. State*, 290 Ga. 428, 721 S.E.2d 892 (2012).

Cruelty to child as underlying felony in felony murder.

Evidence was sufficient to enable a jury to find the defendant guilty of murder, felony murder, cruelty to children, and aggravated battery for the death of the defendant's baby because the defendant admitted to a number of actions consistent with the fatal injuries suffered by the baby; the actions the defendant took against the baby and the resulting injuries were reflected in the autopsy findings. *Stokes v. State*, 289 Ga. 702, 715 S.E.2d 81 (2011).

Death of infant from shaking. — The following evidence was sufficient to establish that the defendant acted with malice

and thus supported the defendant's convictions of felony murder and the predicate felonies of aggravated battery, O.C.G.A. § 16-5-24(a), and first-degree child cruelty, O.C.G.A. § 16-5-70: 1) the defendant claimed the victim, a 16-month-old child who had been left in the defendant's care, became unresponsive and that the defendant shook the child in an attempt to revive the child; 2) a medical examiner testified that the victim died from head trauma; 3) the victim's 10-year-old sibling testified that the defendant had struck the victim in the past and had been yelling at the victim before the victim lost consciousness. *Sears v. State*, 290 Ga. 1, 717 S.E.2d 453 (2011).

16-5-2. Voluntary manslaughter.

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- DEFENSES
- JURY CHARGE
- APPLICATION

General Consideration

Merger of conviction into felony murder.

Trial court properly refused to accept the jury's initial verdict finding the defendant guilty of both felony murder and voluntary manslaughter because the same aggravated assault charge was both the predicate felony for the felony murder charge and the act underlying the voluntary manslaughter charge; therefore, the jury could not find the defendant guilty of both felony murder and voluntary manslaughter because, as charged, the crimes were subject to the modified merger rule, and the first verdicts were ambiguous. *Ingram v. State*, 290 Ga. 500, 722 S.E.2d 714 (2012).

Cited in *Darville v. State*, 289 Ga. 698, 715 S.E.2d 110 (2011).

Defenses

Self-defense.

Evidence was sufficient to support the defendant's conviction for voluntary manslaughter because the defendant's testi-

mony that the initial shot to the victim's head was an accident and that the defendant kept shooting because the victim threatened to kill the defendant was sufficient to allow the jury to conclude beyond a reasonable doubt that the defendant did not justifiably use deadly force to protect oneself, after the victim already had been shot in the head, from the victim's assault pursuant to O.C.G.A. § 16-3-21(a); or the jury simply could have disbelieved the defendant's claim of self-defense, given the number of gunshots fired. *Davis v. State*, 309 Ga. App. 831, 711 S.E.2d 324 (2011).

Trial court did not err in refusing to grant the defendant's motion for a new trial under O.C.G.A. § 5-5-21 because the evidence establishing that the defendant and the victims had engaged in a heated argument, which escalated to preparations for a physical altercation, was sufficient to sustain the defendant's voluntary manslaughter conviction, O.C.G.A. § 16-5-2(a); given the heated exchange and the defendant's belief that the defendant was in serious danger, there was

sufficient provocation to excite the passion necessary for voluntary manslaughter, and the jury was authorized to reject the defendant's claim of self-defense under O.C.G.A. § 16-3-21(a) and conclude that the defendant was so influenced and excited that the defendant reacted passionately, rather simply in self-defense, when the defendant shot an unarmed victim. *White v. State*, 312 Ga. App. 421, 718 S.E.2d 335 (2011).

Jury Charge

Failure to instruct on voluntary manslaughter not error.

Trial court did not err by refusing to charge the jury on voluntary manslaughter because the defendant's testimony that the defendant was not upset but fired a gun out of fear, in self-defense, and in defense of the defendant's parent showed that the defendant did not shoot a child in the heat of passion, and the other evidence was not to the contrary; rather, the testimony of the neighbors, who were the child's parents and the only other trial witnesses present during the shooting demonstrated, at most, that the defendant could have opened fire in response to the neighbors' heated or angry statements, which, as a matter of law, could not constitute "serious provocation" within the meaning of O.C.G.A. § 16-5-2(a). *Davidson v. State*, 289 Ga. 194, 709 S.E.2d 814 (2011).

Trial court's failure to instruct a jury on the lesser included offense of voluntary manslaughter was not error since there was no evidence that the defendant acted in response to a sudden, violent passion resulting from serious provocation. The victim's death was either the cold, calculated method by which defendant intended to profit or, at best, the unfortunate result of resisting an armed robbery. *McNeal v. State*, 289 Ga. 711, 715 S.E.2d 95 (2011).

During the defendant's murder trial, the trial court did not err by denying the defendant's request to charge on the lesser included offense of voluntary manslaughter, O.C.G.A. § 16-5-2, since the defendant testified that the defendant fired a pistol because the defendant was "just scared," and acting out of fear was not the

same as acting in the heat of a sudden irresistible passion. *Funes v. State*, 289 Ga. 793, 716 S.E.2d 183 (2011).

Defendant was not entitled to an instruction on voluntary manslaughter because, while the testimony provided some evidence that the defendant might have acted in self-defense, there was no evidence that the defendant acted passionately. *Allen v. State*, 290 Ga. 743, 723 S.E.2d 684 (2012).

Instruction on involuntary manslaughter unwarranted.

Trial court erred by refusing to charge the jury on involuntary manslaughter, O.C.G.A. § 16-5-3, because a charge on involuntary manslaughter was not generally allowed when the defendant alleged self-defense as the defendant did regarding the shots the defendant fired at the victim after the first shot, and under the facts, the defense of accident as to the first shot did not require such a charge; a charge on involuntary manslaughter in the commission of an unlawful act other than a felony was not required, given that the evidence relied upon by the defendant established either that the pistol discharged accidentally when the victim wrestled for the pistol's control or that the defendant intentionally fired the weapon. *Davis v. State*, 309 Ga. App. 831, 711 S.E.2d 324 (2011).

Voluntary manslaughter charge not erroneous. — Trial court did not err in charging the jury that words alone were insufficient provocation to support a verdict of voluntary manslaughter and that the jury had to find that words were accompanied by menaces in order to sustain a manslaughter verdict because there was no evidence that the victim recounted, taunted, or bragged about sexual involvement with other men; therefore, the circumstances regarding the victim's alleged adulterous conduct did not suffice to replace the requirement of menaces. *Davis v. State*, 290 Ga. 421, 721 S.E.2d 886 (2012).

Application

Evidence sufficient for voluntary manslaughter conviction.

Evidence was sufficient to show beyond a reasonable doubt that the defendant

was guilty of voluntary manslaughter in that the defendant shot and killed the victim out of a sudden, violent, and irresistible passion resulting from serious

provocation sufficient to excite such passion in a reasonable person under O.C.G.A. § 16-5-2(a). *Davis v. State*, 309 Ga. App. 831, 711 S.E.2d 324 (2011).

16-5-3. Involuntary manslaughter.

JUDICIAL DECISIONS

ANALYSIS

JURY INSTRUCTIONS

Jury Instructions

Instruction on involuntary manslaughter unwarranted.

Trial court did not err by failing to give the defendant's requested charge on the lesser included offense of involuntary manslaughter, O.C.G.A. § 16-5-3, because the defendant's admitted act of purposefully putting a gun to the fearful victim's head and pulling the trigger constituted the felony offense of aggravated assault, O.C.G.A. § 16-5-21, not reckless conduct, O.C.G.A. § 16-5-60(b); the defendant's testimony that the victim began crying when the victim saw the gun provided evidence that the victim perceived the gun to be a loaded weapon that could be used to inflict a violent injury, which was a reasonable perception, and the jury's verdict of guilty on the felony murder charge established the existence of all the elements of the underlying felony offense of aggravated assault. *Jones v. State*, 289 Ga. 145, 710 S.E.2d 127 (2011).

Trial court erred by refusing to charge the jury on involuntary manslaughter, O.C.G.A. § 16-5-3, because a charge on involuntary manslaughter was not generally allowed when the defendant alleged self-defense as the defendant did regarding the shots the defendant fired at the victim after the first shot, and under the facts, the defense of accident as to the first shot did not require such a charge; a charge on involuntary manslaughter in the commission of an unlawful act other than a felony was not required, given that

the evidence relied upon by the defendant established either that the pistol discharged accidentally when the victim wrestled for the pistol's control or that the defendant intentionally fired the weapon. *Davis v. State*, 309 Ga. App. 831, 711 S.E.2d 324 (2011).

Failure to charge jury was not prejudicial.

While the trial court erred in rejecting the defendant's written request to charge the jury on unlawful act involuntary manslaughter, pursuant to O.C.G.A. § 16-5-3(a), as a lesser included offense of the crime of murder, the error was harmless because there was overwhelming evidence inconsistent with the defendant's version of events, but supportive of the jury's finding the defendant guilty of malice murder. *Rogers v. State*, 289 Ga. 675, 715 S.E.2d 68 (2011).

Failure to charge on manslaughter not erroneous.

Trial court did not err in refusing to give the defendant's two requested jury charges on involuntary manslaughter because the defendant's own testimony that the gun the defendant was holding made contact with the victim, and when the gun did the defendant gave a push and told the victim to get back, revealed that the defendant's purpose in pointing the weapon was to place the victim in apprehension of immediate violent injury so that there was no basis for a charge on involuntary manslaughter. *Boatright v. State*, 289 Ga. 597, 713 S.E.2d 829 (2011).

16-5-5. Assisted suicide; notification of licensing board regarding violation.

(a) As used in this Code section, the term:

(1) “Assists” means the act of physically helping or physically providing the means.

(2) “Health care provider” means any person licensed, certified, or registered under Chapter 9, 10A, 11, 11A, 26, 28, 30, 33, 34, 35, 39, or 44 of Title 43.

(3) “Suicide” means the intentional and willful termination of one’s own life.

(b) Any person with actual knowledge that a person intends to commit suicide who knowingly and willfully assists such person in the commission of such person’s suicide shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than ten years.

(c) The provisions of this Code section shall not apply to:

(1) Pursuant to a patient’s consent, any person prescribing, dispensing, or administering medications or medical procedures when such actions are calculated or intended to relieve or prevent such patient’s pain or discomfort but are not calculated or intended to cause such patient’s death, even if the medication or medical procedure may have the effect of hastening or increasing the risk of death;

(2) Pursuant to a patient’s consent, any person discontinuing, withholding, or withdrawing medications, medical procedures, nourishment, or hydration;

(3) Any person prescribing, dispensing, or administering medications or medical procedures pursuant to, without limitation, a living will, a durable power of attorney for health care, an advance directive for health care, or a consent pursuant to Code Section 29-4-18 or 31-9-2 when such actions are calculated or intended to relieve or prevent a patient’s pain or discomfort but are not calculated or intended to cause such patient’s death, even if the medication or medical procedure may have the effect of hastening or increasing the risk of death;

(4) Any person discontinuing, withholding, or withdrawing medications, medical procedures, nourishment, or hydration pursuant to, without limitation, a living will, a durable power of attorney for health care, an advance directive for health care, a consent pursuant to Code Section 29-4-18 or 31-9-2, or a written order not to resuscitate; or

(5) Any person advocating on behalf of a patient in accordance with this subsection.

(d) Within ten days of a conviction, a health care provider who is convicted of violating this Code section shall notify in writing the applicable licensing board for his or her licensure, certification, registration, or other authorization to conduct such health care provider's occupation. Upon being notified and notwithstanding any law, rule, or regulation to the contrary, the appropriate licensing board shall revoke the license, certification, registration, or other authorization to conduct such health care provider's occupation. (Code 1981, § 16-5-5, enacted by Ga. L. 2012, p. 637, § 1/HB 1114.)

Effective date. — This Code section became effective May 1, 2012.

Cross references. — Notification of licensing boards of judgments against health care provider, § 51-4-6.

Editor's notes. — Former Code Section 16-5-5, concerning offering to assist in commission of suicide and criminal penalties therefor, was based on Ga. L. 1994,

p. 1370, § 1; Ga. L. 2007, p. 133, § 5/HB 24 and was repealed by Ga. L. 2012, p. 637, § 1/HB 1114, effective May 1, 2012.

Ga. L. 2012, p. 637, § 4/HB 1114, not codified by the General Assembly, provides that: "This Act shall not apply to any offense committed before the effective date of this Act." This Act became effective May 1, 2012.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 16-5-5 are included in the annotations for this Code section.

O.C.G.A. § 16-5-5(b) unconstitutional. — Former O.C.G.A. § 16-5-5(b) was unconstitutional under the free speech provisions of the United States and Georgia Constitutions, U.S. Const., amend. 1 and Ga. Const. 1983, Art. I, Sec. I, Para. V, because it was not all assisted suicides that were criminalized but only those that include a public advertisement

or offer to assist; because the state failed to provide any explanation or evidence as to why a public advertisement or offer to assist in an otherwise legal activity was sufficiently problematic to justify an intrusion on protected speech rights, it could not, consistent with the United States and Georgia Constitutions, make the public advertisement or offer to assist in a suicide a criminal offense. *Final Exit Network, Inc. v. State*, 290 Ga. 508, 722 S.E.2d 722 (2012) (decided under former O.C.G.A. § 16-5-5).

ARTICLE 2

ASSAULT AND BATTERY

16-5-20. Simple assault.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
APPLICATION
JURY INSTRUCTION

General Consideration

Cited in *Myers v. State*, 311 Ga. App. 668, 716 S.E.2d 772 (2011); *Gross v. State*, 312 Ga. App. 362, 718 S.E.2d 581 (2011); *Hall v. State*, 313 Ga. App. 66, 720 S.E.2d 181 (2011).

Application

Reasonable apprehension of violent injury.

Evidence was sufficient to uphold the defendant's conviction for aggravated assault because all of the victims were together in a group, and one of the victim's testified that guns were pointed at everybody; the defendant's act of firing the weapon into the group made each individual a separate victim, and testimony that the victims were crying and screaming when the defendant fired was sufficient for the jury to conclude that the group too had a reasonable apprehension of receiving a violent injury, O.C.G.A. § 16-5-20(a)(2). *Gaither v. State*, 312 Ga. App. 53, 717 S.E.2d 654 (2011), cert. denied, No. S12C0337, 2012 Ga. LEXIS 216 (Ga. 2012).

Excessive force. — When a decedent was tased once in the prong mode during an arrest, and all subsequent tasings were in the dry stun mode, a deputy and an officer were entitled to qualified immunity as to an excessive force claim because the illegality of their behavior was not clearly established at the time since their conduct did not rise to the level of "obvious clarity," because, *inter alia*, the decedent committed assault and battery on a police officer, the decedent's acts were contemporaneous with repeated threats to kill the deputy, and the decedent resisted during the en-

tire time that they tried to handcuff the decedent. *Hoyt v. Cooks*, 672 F.3d 972 (11th Cir. 2012).

Jury Instruction

Charge on simple assault not required.

Because defendant intentionally shot the victim, wounded the victim, chased the victim down, and intentionally shot the victim three more times as the victim begged for the victim's life, and as neither negligence nor reckless conduct was an issue, the trial court did not err by failing to instruct the jury on simple assault under O.C.G.A. § 16-5-20(a) in connection with the court's charge on aggravated assault under O.C.G.A. § 16-5-21. *Cantera v. State*, 289 Ga. 583, 713 S.E.2d 826 (2011).

Charge on simple assault as element of aggravated assault.

Trial court's jury charge on aggravated assault was not erroneous because the trial court properly tailored the court's charge to the allegation in the indictment by charging the jury with just the relevant portion of the simple assault statute, O.C.G.A. § 16-5-20(a)(1); the trial court did as the court was required and delivered a charge tailored to the indictment. *Daniels v. State*, 310 Ga. App. 562, 714 S.E.2d 91 (2011).

Proper jury charge.

Trial court did not refuse to charge on simple assault because the trial court gave verbatim the charge that the defendant complained was not given. *Gaither v. State*, 312 Ga. App. 53, 717 S.E.2d 654 (2011), cert. denied, No. S12C0337, 2012 Ga. LEXIS 216 (Ga. 2012).

16-5-21. Aggravated assault.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

INDICTMENT

INCLUDED CRIMES

ASSAULT WITH DEADLY WEAPON

ASSAULT WITH GUN

ASSAULT WITH AUTOMOBILE

ASSAULT WITH HANDS, FISTS, OR OTHER BODY PARTS

ASSAULT WITH OTHER OBJECTS
 ASSAULT WITH INTENT TO ROB
 ASSAULT WITH INTENT TO RAPE
 JURY INSTRUCTIONS

General Consideration

Jury determinations.

Testimony of the victim and other state witnesses was sufficient to authorize a rational jury to find the defendant guilty beyond a reasonable doubt of aggravated assault, criminal damage to property in the second degree, and battery because it was the role of the jury, not the court of appeals, to resolve conflicts in the evidence, assess witness credibility, and decide whether to believe the victim's or the defendant's version of events; the defendant punched the victim, drew a handgun from the defendant's pants, and fired at the victim, and at trial, the victim, the responding officers, and the state's ballistic expert testified to the events. *Bryant v. State*, 309 Ga. App. 649, 710 S.E.2d 854 (2011).

Evidence was sufficient for a rational factfinder to find the defendant guilty beyond a reasonable doubt of false imprisonment, O.C.G.A. § 16-5-41(a), burglary, O.C.G.A. § 16-7-1(a), and aggravated assault, O.C.G.A. § 16-5-21(a)(2), because although the defendant argued that there was insufficient credible and admissible evidence to show that the defendant was the victim's attacker, determinations of witness credibility and the weight to give the evidence presented was solely within the province of the jury; defense counsel thoroughly cross-examined the victim, the responding officers, and the investigator regarding the victim's demeanor after the attack, the victim's description of the attack and the attacker, and the inconsistencies between what the victim told each of them. *Pennington v. State*, 313 Ga. App. 764, 723 S.E.2d 13 (2012).

Victim's apprehension of violent injuries.

Evidence was sufficient to uphold the defendant's conviction for aggravated assault because all of the victims were together in a group, and one of the victim's testified that guns were pointed at everybody; the defendant's act of firing the

weapon into the group made each individual a separate victim, and testimony that the victims were crying and screaming when the defendant fired was sufficient for the jury to conclude that the group too had a reasonable apprehension of receiving a violent injury, O.C.G.A. § 16-5-20(a)(2). *Gaither v. State*, 312 Ga. App. 53, 717 S.E.2d 654 (2011), cert. denied, No. S12C0337, 2012 Ga. LEXIS 216 (Ga. 2012).

Rule of lenity. — Because attempted murder and aggravated assault were felonies under O.C.G.A. §§ 16-4-6(a) and 16-5-21(j), and because first- and third-degree cruelty to children could not be proven by the same evidence under O.C.G.A. § 16-5-70(b) and (d)(2), the rule of lenity did not apply; therefore, the trial court properly denied the defendant's motion for a new trial. *Rollf v. State*, No. A11A2042, 2012 Ga. App. LEXIS 242 (Mar. 5, 2012).

Merger not appropriate.

Defendant's aggravated assault convictions did not merge because the counts of the indictment requiring the state to prove that the defendant slashed the victim's neck with a sharp-edged instrument, hit the victim with a hammer and wrapped a cord around the victim's neck with the intent to murder were based on different conduct and merger of those convictions was not required. *Thomas v. State*, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Trial court was correct not to merge the defendant's convictions for armed robbery and aggravated assault because although the defendant's conviction for the armed robbery of the victim resulted from a holdup, the conviction for aggravated assault was based on the defendant's forcing the shotgun down the victim's throat later in a bathroom. *Thomas v. State*, 289 Ga. 877, 717 S.E.2d 187 (2011).

Trial court did not err in failing to merge the defendant's aggravated assault convictions because although the convictions arose from the same acts, the convic-

tions did not merge as a matter of fact or law since each count was based upon harm to a different victim. *Gaither v. State*, 312 Ga. App. 53, 717 S.E.2d 654 (2011), cert. denied, No. S12C0337, 2012 Ga. LEXIS 216 (Ga. 2012).

Merger appropriate.

Defendant's convictions for aggravated assault with a deadly weapon and aggravated assault with intent to murder merged for sentencing because both counts of the indictment alleged that the defendant committed aggravated assault by slashing the victim's neck; although one count alleged that the assault was done with a deadly weapon and the other alleged that it was done with the intent to commit murder, O.C.G.A. § 16-5-21(a)(1) and (a)(2), the counts were clearly based on a single act since the razor or knife used in that assault broke while it was pressed against the victim's neck, and thus, the counts merely charged the same act of aggravated assault being committed in two of the multiple ways set out in O.C.G.A. § 16-3-21. *Thomas v. State*, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Defendant's conviction for aggravated assault should have been merged into a malice murder conviction pursuant to O.C.G.A. § 16-1-7(a)(1), based on the "required evidence" test, as the aggravated assault, as pled, did not require proof of a fact not required to have been proved in the malice murder. *Culpepper v. State*, 289 Ga. 736, 715 S.E.2d 155 (2011).

Merger with felony murder. — Defendant's conviction for aggravated assault was not authorized because the count of the indictment that alleged aggravated assault had to be merged into the felony murder count; although the felony murder and the underlying felony were committed on different victims, the count of the indictment alleging felony murder set forth the aggravated assault against a victim as the underlying felony supporting the charge of felony murder. *Glass v. State*, 289 Ga. 542, 712 S.E.2d 851 (2011).

Aggravated assault did not merge with armed robbery.

Trial court did not err when the court refused to merge the defendant's aggravated assault and armed robbery convictions

because the armed robbery and aggravated assault were separate and distinct acts; the victim's testimony showed that the armed robbery was complete before the commission of the aggravated assault. *Brown v. State*, 314 Ga. App. 198, 723 S.E.2d 520 (2012).

Aggravated assault and armed robbery should merge.

Because the defendant's convictions for armed robbery and aggravated assault arose from the same act or transaction, the defendant's taking money from the victim at gunpoint, the defendant's aggravated assault conviction against that victim merged with the armed robbery conviction. *Thomas v. State*, 289 Ga. 877, 717 S.E.2d 187 (2011).

Parties to crime.

State proved that the defendant possessed the intent required to commit the predicate aggravated assault and conspiracy felonies for the felony murder conviction because evidence was sufficient to authorize a rational jury to conclude that the defendant, with a coparty and coconspirator, intended to rob the victim using a deadly weapon, that the victim was reasonably apprehensive of receiving a violent injury as a result of their intentional acts, and that the defendant was guilty beyond a reasonable doubt as a party to the crimes for which the defendant was convicted pursuant to O.C.G.A. § 16-2-2. *Johnson v. State*, 289 Ga. 498, 713 S.E.2d 376 (2011).

Evidence sufficient for conviction.

Evidence was sufficient to support a conviction for aggravated assault since, pursuant to O.C.G.A. § 16-5-21(a)(2), the defendant intentionally committed an act that placed an apartment resident in reasonable apprehension of immediately receiving a violent injury. *Craft v. State*, 309 Ga. App. 698, 710 S.E.2d 891 (2011).

Evidence was sufficient to support the defendant's conviction for aggravated assault because evidence was presented that the defendant and a codefendant entered a restaurant to rob the restaurant and shot two employees of the restaurant. In a statement to the police, the defendant admitted that the defendant entered the restaurant with a handgun to rob the restaurant, but the defendant claimed

that the defendant heard gunshots and left the restaurant, while the codefendant gave a similar statement to the police. *Watkins v. State*, 289 Ga. 359, 711 S.E.2d 655 (2011).

Rational jury could find the defendant guilty beyond a reasonable doubt of aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2) because the evidence was sufficient for the jury to conclude beyond a reasonable doubt that the state disproved the defendant's self-defense claim; the jury was entitled to reject the defendant's version of events, and even if the jury found that the victim threw a bottle at the defendant's car, the jury could have concluded that the defendant struck the victim after any danger had passed and that the defendant's response was excessive. *Hill v. State*, 310 Ga. App. 695, 713 S.E.2d 891 (2011).

Evidence of the circumstances was sufficient to establish the defendant's identity as the perpetrator and the defendant's guilt of armed robbery, O.C.G.A. § 16-8-41, aggravated assault, O.C.G.A. § 16-5-21, and possession of a firearm during the commission of a crime, O.C.G.A. § 16-11-106, because the defendant matched the description of the perpetrator given by both a convenience store clerk and another store employee; when the defendant was apprehended, an officer recovered next to the defendant's person the contraband and instrumentalities used in the commission of the robbery. *Daniels v. State*, 310 Ga. App. 562, 714 S.E.2d 91 (2011).

Defendant's convictions for armed robbery, aggravated assault, and malice murder were based on sufficient evidence where a victim in an apartment next to the defendant's was fatally stabbed multiple times, there was physical evidence that tied the defendant to the criminal incident, and the defendant confessed to committing the crimes. *Culpepper v. State*, 289 Ga. 736, 715 S.E.2d 155 (2011).

Because the defendant pointed a gun at the victim while defendant's accomplices robbed the victim, and thereafter shot at the victim's trailer, hitting a child and killing the victim's sister-in-law, the evidence was sufficient to find defendant guilty of felony murder, aggravated as-

sault, armed robbery, cruelty to children, possession of a gun during the commission of a crime, and possession of a revolver by a person under the age of 18. *Lytle v. State*, 290 Ga. 177, 718 S.E.2d 296 (2011).

Evidence was sufficient to authorize the defendant's convictions for hijacking a motor vehicle, in violation of O.C.G.A. § 16-5-44.1(b), armed robbery, in violation of O.C.G.A. § 16-8-41, aggravated assault, in violation of O.C.G.A. § 16-5-21(a)(2), and possession of a knife during the commission of a crime, in violation of O.C.G.A. § 16-11-106(b), based on the defendant's involvement as a party to the crimes, or as a coconspirator under O.C.G.A. § 16-2-20(b). The evidence presented was that: (1) when two people walked past the victim's parked vehicle, one of the people held a knife to the victim's stomach and ordered the victim to give the person the victim's wallet and keys; (2) the victim complied; (3) the person with the knife got into the driver's seat and the defendant, who had stood nearby during the incident, got into the passenger seat; (3) the victim identified the defendant as the person who got into the passenger seat; (4) the people drove away, but were apprehended; (5) the victim's wallet was recovered, on the ground to the rear of the vehicle, on the passenger side; and (6) the defendant wanted to leave the area because there was a warrant for the defendant's arrest. *Harrelson v. State*, 312 Ga. App. 710, 719 S.E.2d 569 (2011).

Sufficient evidence showed the defendant committed aggravated assault, under O.C.G.A. § 16-5-21(a)(2), in the process of hijacking a victim's vehicle because: (1) the defendant showed a gun when the victim resisted the defendant's attempt to take the victim's car; (2) the victim grabbed the gun and tussled with the defendant showed a reasonable apprehension of harm; and (3) the victim was seriously injured. *Campbell v. State*, 314 Ga. App. 299, 724 S.E.2d 24 (2012).

Evidence was sufficient to sustain the defendant's convictions for armed robbery, O.C.G.A. § 16-8-41(a), aggravated assault, O.C.G.A. § 16-5-21, and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106(b), because

the victim testified about the assault and identified the defendant as the person who committed the assault; the competent testimony of even a single witness can be enough to sustain a conviction. *Brown v. State*, 314 Ga. App. 198, 723 S.E.2d 520 (2012).

Evidence sufficient for conviction of aggravated assault with gun.

Evidence was sufficient for a rational trier of fact to find beyond a reasonable doubt that the defendant was guilty of aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2) because the defendant pointed an air pistol at the victim and threatened to kill the victim. *Leeks v. State*, 309 Ga. App. 724, 710 S.E.2d 908 (2011).

Jury was authorized to find the defendant guilty of voluntary manslaughter, O.C.G.A. § 16-5-2(a), aggravated assault, O.C.G.A. § 16-5-21(a)(2), possession of a firearm during the commission of a crime, O.C.G.A. § 16-11-106(b)(1), carrying a concealed weapon, O.C.G.A. § 16-11-126(b), and possession of a firearm by a convicted felon, O.C.G.A. § 16-11-131(b), because during an argument with the victims, the defendant shot the victims and threatened to kill the victims. *White v. State*, 312 Ga. App. 421, 718 S.E.2d 335 (2011).

Aggravated assault and felony murder.

Jury was authorized to find that the evidence was sufficient to find the defendant guilty beyond a reasonable doubt of felony murder during the commission of aggravated assault in the manner alleged in the indictment because at trial the medical examiner testified that the cause of the victim's death was suffocation; although the defendant told an ex-spouse over the phone that the defendant choked the victim, there was no other evidence to corroborate that statement while there was much physical and scientific evidence that pointed to the cause of death as suffocation. *Davis v. State*, 290 Ga. 421, 721 S.E.2d 886 (2012).

Withdrawal of guilty pleas properly denied.

Trial court did not err in denying the defendant's motion to withdraw the guilty plea to armed robbery, O.C.G.A.

§ 16-8-41(a), aggravated assault with a deadly weapon, O.C.G.A. § 16-5-21(a)(2), cruelty to children in the first degree, O.C.G.A. § 16-5-70(b), and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106(b)(1), because the state met the state's burden of showing that the defendant understood the constitutional rights the defendant was giving up by pleading guilty, that the defendant understood that since the plea was non-negotiated, the trial court would sentence the defendant to at least ten years imprisonment and could sentence the defendant to a maximum sentence of life in prison, and that the defendant knowingly and voluntarily entered the guilty plea in order to avoid a trial on the indicted charges. *Carson v. State*, 314 Ga. App. 225, 723 S.E.2d 516 (2012).

Sentencing.

Defendant's life sentence for armed robbery was within the statutory limits, O.C.G.A. § 16-8-41(b), and the 20-year sentences imposed for the defendant's aggravated assaults were within the statutory range of punishment under O.C.G.A. § 16-5-21(b). Therefore, the sentences were not void, and the court had no basis for disturbing the sentences. *Gillespie v. State*, 311 Ga. App. 442, 715 S.E.2d 832 (2011).

Prior conviction properly admitted. — Trial court did not abuse the court's discretion in allowing the state to introduce evidence of the defendant's prior aggravated assault conviction under O.C.G.A. § 24-9-84.1 because the trial court specifically addressed the relevant factors including the kind of felony involved, the date of the conviction, and the importance of the witness's credibility and properly considered the specific facts and circumstances of the defendant's prior aggravated assault conviction, as required by O.C.G.A. § 24-9-84.1(b), before concluding that the probative value of evidence of the conviction substantially outweighed the evidence's prejudicial effect; the statute itself contains no distinction between defendants and witnesses when more than ten years has passed since the applicable conviction or release. *Dozier v. State*, 311 Ga. App. 713, 716 S.E.2d 802 (2011), overruled on other grounds, *Clay v. State*, 2012 Ga. LEXIS 301 (Ga. 2012).

Indictment

Consolidation of indictments proper.

— Trial court properly consolidated the indictments charging the defendant with armed robbery, criminal attempt to commit armed robbery, aggravated assault, possession of a fire-arm during the commission of a crime, and theft by receiving stolen property because joinder was not prejudicial or erroneous since evidence of the various, intertwined crimes would have been admissible against the defendant had the indictments been tried separately; the trial court was authorized to find that the events in the indictments committed within a two-day period and involving guns and a car constituted a series of connected acts, and the connection between the robberies and the assaults helped identify the defendant. *Jackson v. State*, 309 Ga. App. 796, 714 S.E.2d 584 (2011).

No fatal variance.

There was not a fatal variance between an allegation that the defendant committed aggravated assault against all three members of a group and evidence that defendant only struck one member of the group because: (1) the evidence showed all three were in a group when the defendant fired a gun at the group; and (2) it was well established that the act of firing a weapon into a group made each individual in the group a separate victim and justified a separate count of aggravated assault for each victim. *Martin-Argaw v. State*, 311 Ga. App. 609, 716 S.E.2d 737 (2011).

Included Crimes

Offense merged with attempted armed robbery.

Defendant's conviction for aggravated assault merged into the defendant's conviction for attempted armed robbery because the relevant aggravated assault provision did not require proof of any fact that was not also required to prove the attempted armed robbery as that offense could have been proved under the indictment in the case. *Garland v. State*, 311 Ga. App. 7, 714 S.E.2d 707 (2011).

Merger with armed robbery.

Trial court erred in not merging a de-

fendant's aggravated assault with attempt to rob conviction, O.C.G.A. § 16-5-21(a), into the defendant's armed robbery conviction, O.C.G.A. § 16-8-41. The offense of armed robbery contained a requirement, the taking of property, that aggravated assault did not, but aggravated assault with intent to rob did not require proof of a fact which armed robbery did not. *Daniels v. State*, 310 Ga. App. 541, 713 S.E.2d 689 (2011).

Defendant's convictions for armed robbery and aggravated assault did not merge because each crime required proof of conduct that the other did not; the armed robbery as charged in the indictment required proof of intent to rob and that the victim's wallet was taken, while the aggravated assaults required proof that the victim's neck was slashed with a sharp weapon. *Thomas v. State*, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Trial court's failure to merge the defendant's aggravated assault conviction with the defendant's armed robbery conviction in imposing the sentence was erroneous because there was no element of aggravated assault with a deadly weapon that was not contained in armed robbery; both crimes required proof of an intent to rob because the elements of the defendant's armed robbery charge under O.C.G.A. § 16-8-41(a) included an intent to rob, the use of an offensive weapon, and the taking of property from the person or presence of another, and the elements of the defendant's aggravated assault charge under O.C.G.A. § 16-5-21(a) included an assault upon the victim, an intent to rob, and the use of a deadly weapon. *Daniels v. State*, 310 Ga. App. 562, 714 S.E.2d 91 (2011).

Trial court erred by failing to merge an aggravated assault charge into an armed robbery charge because the victim testified repeatedly that the defendant was in the victim's apartment when the defendant shot the victim and that the victim fired a gun as soon as the victim saw the defendant point a gun at the victim while forcing the defendant's way in; both crimes were complete when the defendant pointed the gun at the victim while simultaneously entering the apartment, and there was no separate aggravated assault before the armed robbery began. *Davis v.*

State, 312 Ga. App. 328, 718 S.E.2d 559 (2011).

Trial court erred in failing to merge the defendant's conviction for aggravated assault with a deadly weapon, O.C.G.A. § 16-5-21(a)(2), into the defendant's conviction for armed robbery conviction, O.C.G.A. § 16-8-41(a), because the act of using an offensive weapon for the purposes of committing an armed robbery was the legal equivalent of assault for the purposes of committing an aggravated assault; it is not determinative under the merger analysis that the desired object of a defendant's armed robbery was something other than that which he or she actually took, but instead, what dictates merger is the fact that both crimes for which the defendant was convicted were predicated upon the same conduct. *Hall v. State*, 313 Ga. App. 66, 720 S.E.2d 181 (2011).

Trial court did not err in failing to merge the aggravated assault count of the indictment with the armed robbery count because the defendant knowingly and voluntarily pled guilty to each of the crimes for which the defendant was indicted, and as a consequence, the defendant waived all defenses except that the indictment charged no crime, including the issue of whether the offenses merged as a matter of law or fact; the defendant chose to admit that the defendant committed the acts so the defendant could avoid a trial on the question of guilt or innocence, and having accepted the benefits of such a bargain, it would be contrary to public policy and the ends of justice to allow the defendant to avoid the consequences of the agreement. *Carson v. State*, 314 Ga. App. 225, 723 S.E.2d 516 (2012).

Aggravated assault merged into aggravated battery.

Defendant's aggravated battery and aggravated assault convictions merged because the counts of the indictment were based on the same conduct of hitting the victim with a hammer, resulting in serious bodily injury to the victim's hand and one of the victim's fingers being rendered useless when the victim placed the victim's hands up in an attempt to protect the victim's head; the aggravated assault was a lesser included offense of the aggra-

vated battery because the aggravated assault required proof of a less serious injury than the aggravated battery. *Thomas v. State*, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Battery conviction merged into aggravated assault conviction. — Trial court correctly ruled that the defendant's conviction for battery merged into the defendant's conviction for aggravated assault because the felony of aggravated assault did not merge into the misdemeanor battery. *Gross v. State*, 312 Ga. App. 362, 718 S.E.2d 581 (2011).

Merger of aggravated assault with malice murder.

Defendant's conviction for aggravated assault of the victim merged into the conviction for malice murder of the victim because there was no evidence that the victim suffered a non-fatal injury prior to a deliberate interval in the attack and a fatal injury thereafter; the forensic pathologist who conducted the autopsy catalogued the victim's wounds as "chop injuries" that fractured the victim's skull and incapacitated the victim and were likely inflicted with a hatchet, punctures and superficial, deep, and very deep incisions and stab wounds that were inflicted by knives. *Alvelo v. State*, 290 Ga. 609, 724 S.E.2d 377 (2012).

Assault with Deadly Weapon

Assault with knife.

Evidence was sufficient to support the trial court's determination that the defendant committed the offense of aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2) because the defendant's attempt to harm a bar patron was transferred to the manager of the bar who was injured; when the defendant retrieved a knife and the manager saw the knife the defendant had committed an act that placed the manager in reasonable apprehension of immediately receiving a violent injury. *Brown v. State*, 313 Ga. App. 907, 723 S.E.2d 115 (2012).

Assault With Gun

Evidence sufficient for assault with gun.

Evidence was sufficient to support the defendant's conviction for aggravated as-

sault, under O.C.G.A. §§ 16-5-21(a)(1) and 16-5-21(a)(2), because: (1) the perpetrator of a crime entered just before closing time a fast-food restaurant with a gun and directed the employees into a room, a cooler, and a freezer; (2) the perpetrator took money from the restaurant, shot one of the employees, and left the scene in the employee's car; (3) one of the employees telephoned relatives with a cell phone and told them what was happening; (4) the relatives called the police, came to the restaurant, and saw the perpetrator drive away; (5) money, a gun, and discarded clothing was recovered from the car or the area where the perpetrator fled on foot; (6) a police officer, who was pursuing the perpetrator, was wounded in an altercation with the perpetrator when the officer's gun discharged; (7) when the defendant later surrendered to the police, DNA from the officer's blood was found on the defendant's chest; and (8) the employees, the relatives, and the officer identified the defendant, a former employee of the restaurant who was fired days before the crime, as the perpetrator. *Donald v. State*, 312 Ga. App. 222, 718 S.E.2d 81 (2011).

Evidence held sufficient.

Evidence was sufficient to support the defendant's conviction for aggravated assault, under O.C.G.A. § 16-5-21(a)(2), because the defendant knocked the victim face-down into a table, pointed a gun at the kneeling and bloodied victim, and threatened to kill the victim and the victim's children with the gun. The defendant later told the victim that the victim was going to commit suicide that night and forced the victim to swallow several unidentified pills. *Reynolds v. State*, 311 Ga. App. 119, 714 S.E.2d 621 (2011).

Evidence was sufficient to authorize a rational trier of fact to find the defendant guilty beyond a reasonable doubt of malice murder, aggravated assault, and possession of a firearm during the commission of a crime because the three men who were with the victim when the victim was shot identified the defendant as the person who fired shots at them; there was testimony that the defendant was the boyfriend of a woman who was the former girlfriend of one of the three men with the murder victim and that the defendant and

the former boyfriend had exchanged heated words earlier the day the victim was killed as well as the afternoon of the day before the shooting. *Glass v. State*, 289 Ga. 706, 715 S.E.2d 85 (2011).

Evidence sufficient for aggravated assault of bus driver. — Trial court did not err in denying the defendant's motion for a directed verdict after a jury found the defendant guilty of aggravated assault with a deadly weapon against a bus driver, O.C.G.A. § 16-5-21(a)(2), because the bus driver testified that the driver did not feel free to drive away since the driver felt the driver's life was in danger; the driver testified that the driver chose not to drive away for fear that the defendant would shoot. *Cannon v. State*, 310 Ga. App. 262, 712 S.E.2d 645 (2011).

Evidence insufficient for conviction.

Evidence was insufficient to support the defendant's conviction for aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2) because there was no affirmative evidence that a restaurant employee saw the defendant with a gun or heard the defendant's threats to shoot; from an officer's description of the scene, the officer did not personally observe the employee climb out of the drive-through window, and thus, the evidence that the employee climbed out of the window rested mainly on the veracity and competence of persons other than the testifying officer, making it hearsay under O.C.G.A. § 24-3-1(a). *Santiago v. State*, No. A11A2256, 2012 Ga. App. LEXIS 153 (Feb. 17, 2012).

Assault With Automobile

Officer stepped backward to avoid being struck by car. — Evidence supported the defendant's conviction for aggravated assault, under O.C.G.A. §§ 16-5-21(a)(2) and 16-5-21(c), because, when a police officer who was directing traffic approached the vehicle which the defendant was driving, the defendant pulled the vehicle out of the traffic, sped directly toward the officer, and then sped away. Furthermore, the officer specifically testified that the officer believed the vehicle would hit the officer and that the officer stepped backward to avoid being

struck. *Myers v. State*, 311 Ga. App. 668, 716 S.E.2d 772 (2011).

Evidence of intent sufficient.

Evidence was sufficient to enable the jury to determine that the defendant was guilty of aggravated assault beyond a reasonable doubt because the jury was authorized to infer from the defendant's conduct that the defendant had an intent to injure a driver or anybody who was in the defendant's way while the defendant attempted to elude police; the defendant crashed into the driver's car while the defendant led police on a high-speed chase in a stolen care. *Johnson v. State*, 289 Ga. 650, 715 S.E.2d 99 (2011).

Assault With Hands, Fists, or Other Body Parts

Evidence sufficient to show beating.

Evidence was insufficient to sustain a juvenile court's finding that a child committed aggravated battery in violation of O.C.G.A. § 16-5-24(a) because there was no showing that the child's ongoing memory and cognitive problems were caused by the beating and not by a preexisting brain tumor and brain surgeries; however, the evidence was sufficient to show an aggravated assault. In the Interest of Q. S., 310 Ga. App. 70, 712 S.E.2d 99 (2011).

Assault With Other Objects

Possession of destructive device offense did not merge with aggravated assault. — Defendant's aggravated assault convictions and the defendant's possession of a destructive device convictions did not merge because the possession offense required that the weapon function in a certain way and have certain dimensions, and the assault offense required that the victim was conscious of the risk of immediately receiving a violent injury by use of an offensive weapon. Because each offense required proof of a fact not required for the other, there was no merger under the required evidence test. *Mason v. State*, 312 Ga. App. 723, 719 S.E.2d 581 (2011).

Assault with Intent to Rob

Merger required.

Defendants' robbery and aggravated as-

sault convictions, under O.C.G.A. §§ 16-5-21 and 16-8-40, merged because, while aggravated assault did not require taking property from another, aggravated assault was proved by the same or less than all facts required to show robbery, as the assault forming the basis of the aggravated assault with intent to rob, which was pointing a pistol at the victim, was "contained within" the element of robbery requiring the defendants to have used force, intimidation, threat or coercion, or placed the victim in fear of immediate serious bodily injury. *Washington v. State*, 310 Ga. App. 775, 714 S.E.2d 364 (2011).

Evidence sufficient for conviction of robbery and assault.

Because the victim's testimony was legally sufficient under O.C.G.A. § 24-4-8 to establish that the defendants assaulted the victim with intent to rob, the issue of which defendant actually held the weapon was immaterial; therefore, pursuant to O.C.G.A. § 16-2-20(a), the evidence was sufficient to find both defendants guilty of aggravated assault with intent to rob and of possession of a firearm during the commission of a felony under O.C.G.A. §§ 16-5-21(a)(1) and 16-11-106. *Clark v. State*, 311 Ga. App. 58, 714 S.E.2d 736 (2011).

Assault with Intent to Rape

Merger of attempted rape and aggravated assault. — Defendant's conviction for aggravated assault with intent to rape under O.C.G.A. § 16-5-21(a)(1) merged into the defendant's conviction for attempted rape under O.C.G.A. §§ 16-4-1 (criminal attempt) and 16-6-1 (rape) because the same evidence supported both convictions and, therefore, the aggravated assault conviction was vacated. *Smith v. State*, 313 Ga. App. 170, 721 S.E.2d 165 (2011).

Jury Instructions

Instruction on reckless conduct charge not warranted.

Defendant was not entitled to a jury charge on the misdemeanors of reckless conduct, O.C.G.A. § 16-5-60(b), as a lesser included offense of the felony counts of aggravated assault because although the defendant relied upon evidence that the

defendant was intoxicated, the defendant cited no evidence that the defendant's intoxicated state was involuntary or that the intoxication resulted in any permanent brain function alteration. *Dailey v. State*, 313 Ga. App. 809, 723 S.E.2d 43 (2012).

Jury's consideration limited to facts alleged in indictment.

Trial court's jury charge on aggravated assault was not erroneous because the trial court properly tailored the court's charge to the allegation in the indictment by charging the jury with just the relevant portion of the simple assault statute, O.C.G.A. § 16-5-20(a)(1); the trial court did as the court was required and delivered a charge tailored to the indictment. *Daniels v. State*, 310 Ga. App. 562, 714 S.E.2d 91 (2011).

Failure to charge jury on simple assault, etc.

Because the defendant intentionally shot the victim, wounded the victim, chased the victim down, and intentionally shot the victim three more times as the victim begged for the victim's life, and as neither negligence nor reckless conduct was an issue, the trial court did not err by failing to instruct the jury on simple assault under O.C.G.A. § 16-5-20(a) in connection with the jury's charge on aggravated assault under O.C.G.A. § 16-5-21. *Cantera v. State*, 289 Ga. 583, 713 S.E.2d 826 (2011).

Charging jury on aggravated assault.

Trial court did not err in failing to define simple assault in the court's charge to the jury because although in the court's definition of felony murder based on aggravated assault, the trial court did not include a definition of simple assault in the court's charge to the jury on aggravated assault, the trial court did cover the fundamentals of simple assault. *Johnson v. State*, 289 Ga. 650, 715 S.E.2d 99 (2011).

Defendant could not show that the trial court erroneously charged the jury as to aggravated assault, under O.C.G.A. § 16-5-21(a)(2), because the defendant helped induce the trial court into giving the aggravated assault jury charge about which the defendant complained and the charge as a whole was not erroneous in

that the trial court's use of the language "actually does" was extraneous. *Gross v. State*, 312 Ga. App. 362, 718 S.E.2d 581 (2011).

Instruction on voluntary manslaughter not warranted.

Trial court did not err by refusing to charge the jury on voluntary manslaughter because the defendant's testimony that the defendant was not upset but fired a gun out of fear, in self-defense, and in defense of the defendant's parent showed that the defendant did not shoot a child in the heat of passion, and the other evidence was not to the contrary; rather, the testimony of the neighbors, who were the child's parents and the only other trial witnesses present during the shooting demonstrated, at most, that the defendant could have opened fire in response to the neighbors' heated or angry statements, which, as a matter of law, could not constitute "serious provocation" within the meaning of O.C.G.A. § 16-5-2(a). *Davidson v. State*, 289 Ga. 194, 709 S.E.2d 814 (2011).

Lesser included offense of pointing gun at another.

Defendant was not entitled to a jury charge on the misdemeanors of pointing a gun at another, O.C.G.A. § 16-11-102, as a lesser included offense of the felony counts of aggravated assault because the victims were placed in reasonable apprehension of immediately receiving a violent injury when defendant pointed a gun at the victims; the only testimony was that the weapon was pointed as a threat and perceived as such, and therefore, an assault. *Dailey v. State*, 313 Ga. App. 809, 723 S.E.2d 43 (2012).

Declining defendant's requested instruction held not error.

Trial court did not err by failing to give the defendant's requested charge on the lesser included offense of involuntary manslaughter, O.C.G.A. § 16-5-3, because the defendant's admitted act of purposefully putting a gun to the fearful victim's head and pulling the trigger constituted the felony offense of aggravated assault, O.C.G.A. § 16-5-21, not reckless conduct, O.C.G.A. § 16-5-60(b); the defendant's testimony that the victim began crying when the victim saw the gun provided

evidence that the victim perceived the gun to be a loaded weapon that could be used to inflict a violent injury, which was a reasonable perception, and the jury's verdict of guilty on the felony murder charge established the existence of all the elements of the underlying felony offense of aggravated assault. *Jones v. State*, 289 Ga. 145, 710 S.E.2d 127 (2011).

Jury charge on defense of habitation.

Trial court did not err in denying the defendant's motion for new trial on the ground of ineffective assistance of counsel because there was no evidence to support

an instruction on defense of habitation pursuant to O.C.G.A. § 16-3-23 and, thus, trial counsel did not perform deficiently in failing to request such an instruction; there was no evidence that the victim was attempting to unlawfully enter or attack the defendant's vehicle at the time the defendant stabbed the victim, and under the facts, there could be no reasonable belief that stabbing the victim was necessary to prevent or terminate the other's unlawful entry into or attack upon a motor vehicle. *Philpot v. State*, 311 Ga. App. 486, 716 S.E.2d 551 (2011).

16-5-23. Simple battery.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Indictment charging involuntary manslaughter sufficiently alleged essential elements of simple battery.

— Trial court committed no error in allowing the state to amend an indictment to charge involuntary manslaughter by the commission of the unlawful act of simple battery in violation of O.C.G.A. §§ 16-5-3(a) and 16-5-23(a), rather than voluntary manslaughter, because the language of the indictment alleged an offensive use of the fists that resulted in bodily injury, and thus, sufficiently alleged all of the essential elements of simple battery; the indictment alleged that the defendant caused the death of the victim by striking the victim with a fist contrary to the laws of the state, the good order, peace, and dignity thereof and, accordingly, the lesser offense of involuntary manslaughter in the commission of the unlawful act of

simple battery was included as a matter of fact in the charged greater offense of voluntary manslaughter. *Morris v. State*, 310 Ga. App. 126, 712 S.E.2d 130 (2011).

Restitution authorized. — Trial court was authorized under O.C.G.A. § 17-14-9 to order the defendant to pay the victim's medical expenses as restitution for damages caused by the defendant's simple battery of the victim in violation of O.C.G.A. § 16-5-23(a) because the court's finding that the victim was injured by and had incurred costs as a result of the defendant's criminal behavior toward the victim was not clearly erroneous; the order for restitution did not exceed the amount of costs the victim incurred, and even if others at the scene could have also kicked the victim, that did not negate the defendant's liability for damages caused by the defendant's role in the attack. *Elsasser v. State*, 313 Ga. App. 661, 722 S.E.2d 327 (2011).

16-5-23.1. Battery.

JUDICIAL DECISIONS

Battery conviction merged into aggravated assault conviction. — Trial court correctly ruled that the defendant's

conviction for battery merged into the defendant's conviction for aggravated assault because the felony of aggravated

assault did not merge into the misdemeanor battery. *Gross v. State*, 312 Ga. App. 362, 718 S.E.2d 581 (2011).

Family violence battery.

Because there was evidence to support each fact necessary to make out the state's case, the jury was authorized to find that the defendant was guilty beyond a reasonable doubt of family violence battery, O.C.G.A. § 16-5-23.1, criminal trespass, O.C.G.A. § 16-7-21, and abuse of an elder person, O.C.G.A. § 30-5-8; the victim's recollection of what occurred on the night at issue was contradicted by the victim's contemporaneous statements to neighbors and the police, as well as the victim's statements to the daughter the next morning that the defendant had grabbed the victim by the arm and twisted the arm, thereby causing the wound and other bruises. *Laster v. State*, 311 Ga. App. 360, 715 S.E.2d 768 (2011).

Evidence was sufficient

Defendant's battery conviction under O.C.G.A. § 16-5-23.1(b) was supported by evidence that the defendant struck the victim in the eye with the defendant's hand, causing the eye to swell. A charge on the lesser included offense of reckless conduct under O.C.G.A. § 16-5-60(b), was not warranted because there was no evidence that the defendant fired a gun negligently; the only evidence was that the defendant fired several shots at the victim. *Tiller v. State*, 314 Ga. App. 472, 724 S.E.2d 397 (2012).

Jury was authorized to find the defendant guilty of family violence battery, O.C.G.A. § 16-5-23.1(f), battery, O.C.G.A. § 16-5-23.1(a), and disorderly conduct because the prior inconsistent statements of the defendant's wife constituted substantive evidence upon which the jury could rely in reaching a verdict; the wife had told officers that she had attempted to leave but that the defendant would not let her, and that he had hit her. *Kemp v. State*, No. A11A1777, 2012 Ga. App. LEXIS 273 (Mar. 12, 2012).

Charging jury on entire code section. — Trial court charged the jury on the entire battery code section, including the requirement that the defendant commit substantial physical harm, even though the defendant was only charged with committing visible bodily harm; this was not error because the charge as a whole limited the jury to considering the crime as charged in the indictment. *Tiller v. State*, 314 Ga. App. 472, 724 S.E.2d 397 (2012).

Jury instruction on prior difficulties. — Trial court did not err by failing to give a limiting instruction before admitting evidence of prior difficulties because the defendant's trial counsel did not request a limiting instruction on the prior difficulties, and the trial court instructed the jury on prior difficulties evidence in the final jury charge. *Kemp v. State*, No. A11A1777, 2012 Ga. App. LEXIS 273 (Mar. 12, 2012).

16-5-24. Aggravated battery.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

APPLICATION

JURY INSTRUCTIONS

General Consideration

Merger with reckless conduct.

Because a charge under O.C.G.A. § 16-5-24(a) for aggravated battery required showings of malice and disfigurement, while the charge under O.C.G.A. § 16-5-60(b) for reckless conduct did not require any more proof beyond showing

the defendant shot the victim causing bodily harm, the reckless conduct charge should have merged into the aggravated battery charge as a matter of fact. *DeLeon v. State*, 289 Ga. 782, 716 S.E.2d 173 (2011).

Aggravated assault merged into aggravated battery.

Defendant's aggravated battery and ag-

gravated assault convictions merged because the counts of the indictment were based on the same conduct of hitting the victim with a hammer, resulting in serious bodily injury to the victim's hand and one of the victim's fingers being rendered useless when the victim placed the victim's hands up in an attempt to protect the victim's head; the aggravated assault was a lesser included offense of the aggravated battery because the aggravated assault required proof of a less serious injury than the aggravated battery. *Thomas v. State*, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

State failed to present any evidence of venue. — State failed to present any evidence of venue because Liberty County was not mentioned by any witness, and the state showed only that the crime of aggravated assault occurred on a certain street, but the fact that the prosecutor noted in the opening statement that the street was a block from the Liberty County Courthouse did not establish that the crime scene was in Liberty County; the state's photographic evidence failed to establish that the crime occurred in Liberty County because the photograph contained nothing that indicated the city, county, or state in which the area depicted was located. *Bizzard v. State*, 312 Ga. App. 185, 718 S.E.2d 52 (2011).

Application

Fractured arm rendering hand useless. — Evidence was sufficient to support a defendant's conviction for aggravated battery based on testimony that the defendant struck the victim with a stick, fracturing the victim's arm above the wrist and rendering the victim's left hand useless. *Dean v. State*, 313 Ga. App. 726, 722 S.E.2d 436 (2012).

Injury to finger and eye. — Defendant's aggravated battery convictions did not merge because the counts of the indictment were predicated on different conduct; in order to prove one count of the indictment, the state had to show that the victim threw bleach in the victim's eyes, and in order to prove another count of the indictment, the state had to prove that the victim's finger was rendered useless because the finger was repeatedly struck

with a hammer. *Thomas v. State*, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Legs rendered useless.

Evidence was sufficient to support the defendant's aggravated battery conviction under O.C.G.A. § 16-5-24(a) because the medical evidence regarding the shooting victim's rehabilitation and the victim's ongoing gait impairment was sufficient to allow the jury to conclude that the victim's legs were rendered useless by the shooting. *Jimmerson v. State*, 289 Ga. 364, 711 S.E.2d 660 (2011).

Evidence sufficient for aggravated battery because hot bleach thrown on victim.

Evidence was sufficient to support the defendant's convictions for aggravated battery, O.C.G.A. § 16-5-24(a), first degree cruelty to children, O.C.G.A. § 16-5-70(b), and second degree cruelty to children, O.C.G.A. § 16-5-70(c), because the victim stated in a forensic interview and testified at trial that the defendant had burned the victim with hot water on more than one occasion and that the defendant had slapped the victim's face and punched the victim in the stomach; the victim was admitted to the hospital with severe burns on the feet, buttocks, and scrotum, and the victim's mother testified that the victim had been under the defendant's care at the time the victim received the burns. *Jackson v. State*, 310 Ga. App. 476, 713 S.E.2d 679 (2011).

Victim with cognitive and memory losses. — Evidence was insufficient to sustain a juvenile court's finding that a child committed aggravated battery in violation of O.C.G.A. § 16-5-24(a) because there was no showing that the victim's ongoing memory and cognitive problems were caused by the beating and not by a preexisting brain tumor and brain surgeries. In the Interest of Q. S., 310 Ga. App. 70, 712 S.E.2d 99 (2011).

Sufficient injury to warrant conviction for aggravated battery.

Evidence was sufficient to support the defendant's conviction for aggravated battery, O.C.G.A. § 16-5-24(a), because the evidence was sufficient for the jury to determine that the defendant caused the victim to sustain visible, severe burns and large hypertrophic scars on the victim's

skin, which required ongoing surgeries and corrective procedures; because the evidence established that the defendant caused the victim's skin to be seriously disfigured, burned, and scarred, the aggravated battery conviction was authorized. *Wells v. State*, 309 Ga. App. 661, 710 S.E.2d 860 (2011).

Trial court did not err in convicting the defendant of aggravated battery because the evidence was sufficient for any rational trier of fact to conclude beyond a reasonable doubt that the defendant's blows rendered the victim's mouth and jaw useless and that the defendant was guilty of aggravated battery beyond a reasonable doubt; the victim testified that the victim's jaw did not function normally after the victim was injured. *Tidwell v. State*, 312 Ga. App. 468, 718 S.E.2d 808 (2011), cert. denied, 2012 Ga. LEXIS 277 (Ga. 2012).

Evidence sufficient to support conviction.

Evidence was sufficient to support the defendant's conviction for aggravated battery, under O.C.G.A. § 16-5-24(a), because the defendant knocked the victim face-down into a table, pointed a gun at the kneeling and bloodied victim, and threatened to kill the victim and the victim's children with the gun. The victim lost sight and required surgery to correct all the facial fractures which the victim suffered. *Reynolds v. State*, 311 Ga. App. 119, 714 S.E.2d 621 (2011).

Evidence was enough to prove beyond a reasonable doubt that the defendant committed aggravated battery in violation of O.C.G.A. § 16-5-24 because the defendant acted intentionally and without provocation or justification when the defendant struck the victim; the defendant physically assaulted the victim and repeatedly told the victim that the defendant was going to kill the victim, and the defendant hit the victim in the face with such force that the victim lost consciousness. *Bizzard v. State*, 312 Ga. App. 185, 718 S.E.2d 52 (2011).

Evidence sufficient for aggravated battery against child.

The following evidence was sufficient to establish that the defendant acted with malice and thus supported the defendant's

convictions of felony murder and the predicate felonies of aggravated battery, O.C.G.A. § 16-5-24(a), and first-degree child cruelty, O.C.G.A. § 16-5-70: 1) the defendant claimed the victim, a 16-month-old child who had been left in the defendant's care, became unresponsive and that the defendant shook the child in an attempt to revive the child; 2) a medical examiner testified that the victim died from head trauma; 3) the victim's 10-year-old sibling testified that the defendant had struck the victim in the past and had been yelling at the victim before the victim lost consciousness. *Sears v. State*, 290 Ga. 1, 717 S.E.2d 453 (2011).

Sentencing.

It was not erroneous for the trial court to impose a sentence of 20 years for aggravated battery, O.C.G.A. § 16-5-24, because after the defendant's kidnapping conviction was voided, the trial court was authorized under O.C.G.A. § 17-10-1 to sentence the defendant to a term of years on the aggravated battery count, which could consist of up to 20 years. *Griggs v. State*, 314 Ga. App. 158, 723 S.E.2d 480 (2012).

Trial court did not err by correcting the court's written sentence to conform with its oral pronouncement because the trial court was authorized to correct the clerical error appearing in the court's written sentence as compared to the court's original oral pronouncement; the trial court, after reviewing the original transcript, determined that the court's original pronouncement and intent was for the aggravated battery and burglary counts to be served consecutive to each other as well as to the other aggravated battery count. *Griggs v. State*, 314 Ga. App. 158, 723 S.E.2d 480 (2012).

Jury Instructions

Instructions to jury.

Trial court did not err in denying the defendant's motion for new trial on the ground of ineffective assistance of counsel because there was no evidence to support an instruction on defense of habitation pursuant to O.C.G.A. § 16-3-23 and, thus, trial counsel did not perform deficiently in failing to request such an instruction; there was no evidence that the victim was

attempting to unlawfully enter or attack the defendant's vehicle at the time the defendant stabbed the victim, and under the facts, there could be no reasonable belief that stabbing the victim was necessary to prevent or terminate the other's unlawful entry into or attack upon a motor vehicle. *Philpot v. State*, 311 Ga. App. 486, 716 S.E.2d 551 (2011).

Instruction on accident. — In a prosecution for felony murder and the predicate felonies of aggravated battery,

O.C.G.A. § 16-5-24(a), and first-degree child cruelty, O.C.G.A. § 16-5-70, assuming arguendo that the evidence supported an instruction on accident, the trial court's failure to give that instruction was not reversible error, as the jury's conclusion that the defendant acted with malice, which was supported by overwhelming evidence, necessarily meant that the jury would have rejected any accident defense. *Sears v. State*, 290 Ga. 1, 717 S.E.2d 453 (2011).

16-5-27. (Effective January 1, 2013. See note.) Female genital mutilation.

Law reviews. — For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011). For article on the 2011 amendment of this

Code section, see 28 Ga. St. U. L. Rev. 1 (2011).

ARTICLE 3

KIDNAPPING, FALSE IMPRISONMENT, AND RELATED OFFENSES

16-5-40. Kidnapping.

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- RELATIONSHIP TO OTHER OFFENSES
- JURY INSTRUCTIONS
- PUNISHMENT
- APPLICATION

General Consideration

"Asportation" of the victim, etc.

Evidence was sufficient to sustain defendant's kidnapping conviction based on defendant's jumping into a soft drink delivery truck and forcing the driver at gunpoint to drive more than six miles from a lighted parking lot to a secluded dirt road, thereby isolating the driver and making it less likely that anyone would discover the driver's predicament and come to the driver's aid. *Howard v. State*, 310 Ga. App. 659, 714 S.E.2d 255 (2011).

Defendant's movement of a victim from the outside of a storage unit to inside the unit, where the defendant produced a knife and attempted to rape the victim,

was sufficient to show asportation as required under the kidnapping statute, O.C.G.A. § 16-5-40(a). Although the movement was of brief duration, the movement was not an inherent part of the other offenses. *Smith v. State*, 313 Ga. App. 170, 721 S.E.2d 165 (2011).

Relationship to Other Offenses

No merger of kidnapping and robbery by intimidation.

Because a defendant forced the victim to drive to an abandoned house and then drove the victim through other neighborhoods before forcing the victim out of the car and refusing to return the victim's personal belongings, the defendant's con-

victions for kidnapping and robbery by intimidation under O.C.G.A. §§ 16-5-40(a) and 16-8-40 did not merge; pursuant to O.C.G.A. § 17-2-2(e), venue was proper in any county through which the vehicle traveled. *Aldridge v. State*, 310 Ga. App. 502, 713 S.E.2d 682 (2011).

Kidnapping and false imprisonment all separate offenses.

Defendant's conviction for false imprisonment did not merge with the offense of kidnapping since the kidnapping occurred when the defendant forced the victim to move to a secluded location and held the victim there against the victim's will. After the defendant raped the victim, the defendant falsely imprisoned the victim on the premises by shoving the victim to the ground and ordering the victim to remain under threat of violence while the defendant escaped. These two events were separate in time and supported by separate facts. Consequently, the acts constituted separate offenses which did not merge. *Scales v. State*, 310 Ga. App. 48, 712 S.E.2d 555 (2011).

Jury Instructions

Failure to instruct on false imprisonment not harmless. — Defendant's conviction for kidnapping with bodily injury in violation of O.C.G.A. § 16-5-40(a) was reversed because the trial court erred in failing to charge the jury on the lesser-included offense of false imprisonment, O.C.G.A. § 16-5-41(a); there was some evidence from which the jury could have convicted the defendant on the lesser-included offense, and the evidence of kidnapping was not so overwhelming so as to render the trial court's failure to give the charge harmless. *Curtis v. State*, 310 Ga. App. 782, 714 S.E.2d 666 (2011).

Punishment

No merger with aggravated assault.

Trial court did not err in declining to merge under O.C.G.A. § 16-1-7(a) kidnapping counts with aggravated assault counts because the aggravated assault involved different conduct from the kidnapping and was completed prior thereto and, thus, the same conduct did not establish the commission of both offenses; even if the kidnapping counts involved the

same conduct as the aggravated assault, neither was included in the other after application of the "required evidence" test. *Jones v. State*, 290 Ga. 670, No. S12A0040, 2012 Ga. LEXIS 256 (2012).

Mandatory minimum sentence. — O.C.G.A. §§ 16-5-40(d)(2) and 17-10-6.1(b)(2), as applied to the defendant did not violate due process because an earlier indictment charged regular kidnapping and, only after plea negotiations failed, was the more severe sentence included in a re-indictment because such circumstances did not raise a presumption of prosecutorial vindictiveness in the absence of actual evidence thereof. *Jones v. State*, 290 Ga. 670, No. S12A0040, 2012 Ga. LEXIS 256 (2012).

O.C.G.A. §§ 16-5-40(d)(2) and 17-10-6.1(b)(2) do not violate equal protection by punishing a person differently depending on the age of the victim because that classification is not arbitrarily drawn and instead is rationally related to the legitimate governmental interest in protecting children. *Jones v. State*, 290 Ga. 670, No. S12A0040, 2012 Ga. LEXIS 256 (2012).

Sentence proper.

Trial counsel did not render ineffective assistance by failing to raise the constitutionality of the defendant's mandatory minimum sentence of 25 years imprisonment without parole, as codified in O.C.G.A. §§ 16-5-40(d)(2) and 17-10-6.1(b)(2), because the defendant's concurrent 25-year sentences for child kidnapping did not raise a threshold inference of gross disproportionality; after beating the mother in the young children's presence so severely as to break her jaw and cause other injuries, the defendant ordered all three of the victims to enter a car, drove the victims away, and left the victims in a location where the victims were isolated and unprotected. *Jones v. State*, 290 Ga. 670, No. S12A0040, 2012 Ga. LEXIS 256 (2012).

Application

Evidence sufficient to support conviction.

Trial court did not err in denying the defendant's motion for a directed verdict of acquittal because the state presented sufficient evidence to corroborate a coconspirator's testimony under O.C.G.A. § 24-4-8

and for the jury to find beyond a reasonable doubt that the defendant committed armed robbery, O.C.G.A. § 16-8-41(a), hijacking a motor vehicle, O.C.G.A. § 16-5-44.1(b), and kidnapping, O.C.G.A. § 16-5-40(a); the state presented the testimony of numerous witnesses and other evidence that sufficiently corroborated the co-conspirator's testimony about the defendant's participation in the crimes. *Walker v. State*, 310 Ga. App. 223, 713 S.E.2d 413 (2011).

When the second victim was moved from the front door, through the house, and into the bedroom the element of asportation was established; the movement enhanced the defendant's control over the second victim and isolated the second victim from protection or potential rescue. *Goolsby v. State*, 311 Ga. App. 650, 718 S.E.2d 9 (2011).

Evidence fully supported the defendant's kidnapping convictions because the defendant forced the victims into a bathroom after the defendant had robbed two other victims, and the movement was not an integral part of the armed robbery offenses; herding the victims into the small and confined bathroom made it easier for the defendant to control the victims, thus making the situation more dangerous for the victims. *Thomas v. State*, 289 Ga. 877, 717 S.E.2d 187 (2011).

Because the driver of a delivery truck was forced at gunpoint by defendant's accomplice to drive a substantial distance to a secluded dirt road, and because the defendant followed the truck in another vehicle, pursuant to O.C.G.A. §§ 16-2-20 and 16-5-40, the evidence was sufficient to convict the defendant of kidnapping and possession of a firearm during the commission of a felony. *Sipplen v. State*, 312 Ga. App. 342, 718 S.E.2d 571 (2011).

Sufficient evidence supported the defendant's conviction for kidnapping because even if the victim's entry into the defendant's truck was voluntary, the defendant did so under the mistaken belief that the defendant would take the victim to the hospital, and the victim attempted to escape further attack after the defendant stopped on the side of the road; at that point, the defendant caught the victim, again stabbed the victim numerous times, and dragged the victim by the legs into a

ditch, effectively concealing the victim from passing traffic, when the victim was unable to move or otherwise resist. *Calloway v. State*, 313 Ga. App. 708, 722 S.E.2d 422 (2012).

Evidence insufficient to support conviction.

When the first victim was forced back "just a few steps" to the couch, the movement occurred before the rape and was incidental and in furtherance of the rape, and the movement was not a necessary element of the rape, the evidence did not support the defendant's conviction for kidnapping with bodily injury. *Goolsby v. State*, 311 Ga. App. 650, 718 S.E.2d 9 (2011).

Insufficient evidence of asportation.

Evidence on a kidnapping charge was insufficient to satisfy the element of asportation because the movement of the victim was of short or minimal duration, occurring during the course and incidental to assaults upon the victim; the movement occurred after the assault on the victim had begun when the victim attempted to fight back against the attackers, and the attackers were struggling to regain control over the victim and subdue the victim, but as soon as the victim was subdued and bound, the victim was returned to the room where the assault on the victim's person continued. *Thomas v. State*, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Sufficient evidence of asportation.

Evidence was sufficient to prove the element of asportation and to support the defendant's kidnapping conviction where the defendant snatched the victim from the sidewalk, forced the victim across a parking lot and onto the premises of a restaurant, took the victim up a flight of stairs to a secluded deck where the victim could not be seen, and then raped the victim. Although the duration of the movement was relatively short, and although the movement facilitated the rape, the movement did not constitute an inherent part of that rape. The defendant's movement of the victim substantially isolated the victim from protection or rescue. *Scales v. State*, 310 Ga. App. 48, 712 S.E.2d 555 (2011).

Movement at issue was sufficient evidence of asportation because, after the defendant assaulted the victim, the defendant forced the severely injured victim at gunpoint to leave the victim's house, walk through a trail behind the house to a secluded wooded area, made the victim kneel on the ground on the victim's hands and knees, and for a significant period of time threatened to kill the victim or the victim's children as the victim begged for the victim's life. The defendant's actions further isolated the victim, thereby creating additional danger to the victim and removing the victim from the possibility of rescue or escape, and reinforced the defendant's control over the victim. *Reynolds v. State*, 311 Ga. App. 119, 714 S.E.2d 621 (2011).

There was sufficient evidence of asportation to support the defendant's kidnapping convictions because after the defendant robbed the cash register, the defendant forced the victims to move from the front of the store to the back of the store and later further back into an office; the further movement into the back office occurred after the robbery was completed, and that movement was not a necessary or inherent part of the robbery but created additional danger to the victims. *Green v. State*, 310 Ga. App. 874, 714 S.E.2d 646 (2011), cert. denied, 2012 Ga. LEXIS 232 (Ga. 2012).

Defendant's act of dragging the victim by the hair inside a house to begin an attack anew, after the victim temporarily managed to escape and was screaming for help, was sufficient evidence of asportation to support the defendant's kidnapping conviction because although the movement was arguably of minimal duration, the act was not an inherent part of the violent attack that the victim had endured; instead, the defendant's act allowed the defendant to reassert control over the victim and to reinitiate the savage beating without interference, further isolating the victim from rescue and increasing the victim's risk of harm. *Curtis v. State*, 310 Ga. App. 782, 714 S.E.2d 666 (2011).

Defendant's act of grabbing one victim by the throat and pulling that victim from the kitchen into the living room was suf-

ficient evidence of asportation to support the defendant's kidnapping conviction. The defendant's act of dragging the other victim inside the home to resume a beating was sufficient evidence of asportation as to that victim. Although the duration of the movement was brief, each act allowed the defendant and the co-defendant to control their victims without interference, further isolating the victims from rescue and increasing the risk of harm. *Tolbert v. State*, 313 Ga. App. 46, 720 S.E.2d 244 (2011).

Evidence was sufficient to establish the asportation element of the defendant's kidnapping convictions because the defendant's removal of children from their bedrooms by gunpoint and into the kitchen was not an inherent part of the crimes as the children's movement to the kitchen was not necessary to effect the completion of the burglary, armed robbery, or aggravated assault; also, by moving the children from their rooms, the children were placed in greater danger because the defendant and the accomplice's control over the children was enhanced. *Patterson v. State*, 312 Ga. App. 793, 720 S.E.2d 278 (2011), cert. denied, No. S12C0574, 2012 Ga. LEXIS 327 (Ga. 2012).

Because the defendant moved the victims from the front of a pawn shop into a back office in order to isolate the victims from outside view and to significantly decrease the chance that the victims could summon assistance, the element of asportation was satisfied; therefore, the defendant was properly convicted of kidnapping under O.C.G.A. § 16-5-40. *Onumah v. State*, 313 Ga. App. 269, 721 S.E.2d 115 (2011).

All four factors that had to be considered in determining whether the asportation element of kidnapping was met had been satisfied because the duration of the movement of the victims to a car and while riding therein occurred after the offense of aggravated assault was completed; the movement presented a significant danger to the victims apart from the separate offense because it enhanced the defendant's control over the victims, serving substantially to isolate the victims from protection or rescue and increasing the risks that further injury

would occur in the event of an attempted escape and that the victims would be taken to a second location. *Jones v. State*, 290 Ga. 670, No. S12A0040, 2012 Ga. LEXIS 256 (2012).

Evidence was sufficient to establish the asportation element of the defendant's kidnapping with bodily injury conviction because movement occurred when the defendant pressed a knife to the victim's

throat and forced the victim from the kitchen into the bedroom where the defendant raped and sodomized the victim and committed armed robbery; the movement was not an inherent part of the crimes because the victim's movement to the bedroom was not necessary to effect the completion of the rape, aggravated sodomy, or armed robbery. *Holden v. State*, 314 Ga. App. 36, 722 S.E.2d 873 (2012).

16-5-41. False imprisonment.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

APPLICATION

JURY INSTRUCTIONS

General Consideration

Citizen's arrest not valid defense to offense of false imprisonment. — Trial evidence showed that defendant confined the victim in the bedroom without lawful authority. In light of defendant's testimony that the victim had not been confined at all, trial counsel was not ineffective in failing to pursue jury instructions based on an inconsistent theory that defendant had in fact confined the victim, but was legally authorized to do so. *Smith v. State*, No. A11A1718, 2012 Ga. App. LEXIS 239 (Mar. 5, 2012).

Application

Kidnapping and false imprisonment.

Defendant's conviction for false imprisonment did not merge with the offense of kidnapping since the kidnapping occurred when the defendant forced the victim to move to a secluded location and held the victim there against the victim's will. After the defendant raped the victim, the defendant falsely imprisoned the victim on the premises by shoving the victim to the ground and ordering the victim to remain under threat of violence while the defendant escaped. These two events were separate in time and supported by separate facts. Consequently, the acts constituted separate offenses which did not

merge. *Scales v. State*, 310 Ga. App. 48, 712 S.E.2d 555 (2011).

Evidence sufficient to support conviction.

Jury's verdict convicting a defendant of false imprisonment was supported by evidence that the defendant threatened the victim, a 65-year-old widow, and ordered her to stay on her bed in the nude while the defendant spit on her and cursed her, then ordered her to sit in a filled bathtub where the defendant threatened to drop a hair dryer into the tub with her. *Schneider v. State*, 312 Ga. App. 504, 718 S.E.2d 833 (2011).

Evidence was sufficient to support the defendant's conviction for false imprisonment, under O.C.G.A. § 16-5-41(a), because: (1) the perpetrator of a crime entered just before closing time a fast-food restaurant with a gun and directed the employees into a room, a cooler, and a freezer; (2) the perpetrator took money from the restaurant, shot one of the employees, and left the scene in the employee's car; (3) one of the employees telephoned relatives with a cell phone and told the relatives what was happening; (4) the relatives called the police, came to the restaurant, and saw the perpetrator drive away; (5) money, a gun, and discarded clothing was recovered from the car or the area where the perpetrator fled on foot; (6) a police officer, who was pursuing the

perpetrator, was wounded in an altercation with the perpetrator when the officer's gun discharged; (7) when the defendant later surrendered to the police, DNA from the officer's blood was found on the defendant's chest; and (8) the employees, the relatives, and the officer identified the defendant, a former employee of the restaurant who was fired days before the crime, as the perpetrator. *Donald v. State*, 312 Ga. App. 222, 718 S.E.2d 81 (2011).

Evidence was sufficient for a rational factfinder to find the defendant guilty beyond a reasonable doubt of false imprisonment, O.C.G.A. § 16-5-41(a), burglary, O.C.G.A. § 16-7-1(a), and aggravated assault, O.C.G.A. § 16-5-21(a)(2), because although the defendant argued that there was insufficient credible and admissible evidence to show that the defendant was the victim's attacker, determinations of witness credibility and the weight to give the evidence presented was solely within the province of the jury; defense counsel thoroughly cross-examined the victim, the responding officers, and the investigator regarding the victim's demeanor after the attack, the victim's description of the attack and the attacker, and the inconsistencies between what the victim told each of them. *Pennington v. State*, 313 Ga. App. 764, 723 S.E.2d 13 (2012).

Sufficient factual basis for false imprisonment charge. — Trial court did not abuse the court's discretion in refusing to allow withdrawal of the defendant's guilty plea on the ground that the factual basis set forth by the state was insufficient to support the false imprisonment charge, O.C.G.A. § 16-5-41, because the state's recitation of facts reflecting that the defendant had detained the victim on a bed and inside the defendant's residence presented a sufficient factual basis for the false imprisonment charge. *James v. State*, 309 Ga. App. 721, 710 S.E.2d 905 (2011).

Jury Instructions

Jury instruction on false imprisonment should have been given.

Defendant's conviction for kidnapping with bodily injury in violation of O.C.G.A. § 16-5-40(a) was reversed because the trial court erred in failing to charge the jury on the lesser-included offense of false imprisonment, O.C.G.A. § 16-5-41(a); there was some evidence from which the jury could have convicted the defendant on the lesser-included offense, and the evidence of kidnapping was not so overwhelming so as to render the trial court's failure to give the charge harmless. *Curtis v. State*, 310 Ga. App. 782, 714 S.E.2d 666 (2011).

16-5-44.1. Hijacking a motor vehicle.

JUDICIAL DECISIONS

Evidence sufficient for conviction.

Trial court did not err in denying the defendant's motion for a directed verdict of acquittal because the state presented sufficient evidence to corroborate a coconspirator's testimony under O.C.G.A. § 24-4-8 and for the jury to find beyond a reasonable doubt that the defendant committed armed robbery, O.C.G.A. § 16-8-41(a), hijacking a motor vehicle, O.C.G.A. § 16-5-44.1(b), and kidnapping, O.C.G.A. § 16-5-40(a); the state presented the testimony of numerous witnesses and other evidence that sufficiently corroborated the co-conspirator's testimony about the defendant's participation

in the crimes. *Walker v. State*, 310 Ga. App. 223, 713 S.E.2d 413 (2011).

Evidence was sufficient to authorize the defendant's convictions for hijacking a motor vehicle, in violation of O.C.G.A. § 16-5-44.1(b), armed robbery, in violation of O.C.G.A. § 16-8-41, aggravated assault, in violation of O.C.G.A. § 16-5-21(a)(2), and possession of a knife during the commission of a crime, in violation of O.C.G.A. § 16-11-106(b), based on the defendant's involvement as a party to the crimes, or as a coconspirator under O.C.G.A. § 16-2-20(b). The evidence presented was that: (1) when two people walked past the victim's parked vehicle,

one of the people held a knife to the victim's stomach and ordered the victim to give the person the victim's wallet and keys; (2) the victim complied; (3) the person with the knife got into the driver's seat and the defendant, who had stood nearby during the incident, got into the passenger seat; (3) the victim identified the defendant as the person who got into the passenger seat; (4) the people drove away, but were apprehended; (5) the victim's wallet was recovered, on the ground to the rear of the vehicle, on the passenger side; and (6) the defendant wanted to leave the area because there was a warrant for the defendant's arrest. *Harrelson v. State*, 312 Ga. App. 710, 719 S.E.2d 569 (2011).

Sufficient evidence showed the defendant committed a hijacking, under O.C.G.A. § 16-5-44.1(b), because: (1) the statute included attempt as a means of committing the crime; and (2) the defendant's assertion of ownership of a victim's vehicle and the fact that the victim was pulled out of the vehicle constituted substantial steps toward committing the crime. *Campbell v. State*, 314 Ga. App. 299, 724 S.E.2d 24 (2012).

Evidence sufficient for attempt to hijack motor vehicle. — Given that a defendant repeatedly stabbed a victim in the throat in a parking lot to attempt to force the victim to get inside the victim's car, the trial court could find that the defendant rejected the car keys when the victim offered the keys because the defendant intended to abscond with both the car and the victim as needed to prove attempted hijacking of a motor vehicle under O.C.G.A. §§ 16-4-1 and 16-5-44.1(b). *Hickman v. State*, 311 Ga. App. 544, 716 S.E.2d 597 (2011).

Jury instructions.

Defendant's trial counsel was not ineffective in failing to request a jury charge on hijacking a motor vehicle because under O.C.G.A. § 16-5-44.1(c) hijacking a motor vehicle was punishable by imprisonment for not less than ten nor more than 20 years, the same range as kidnapping. Therefore, the defendant could show no prejudice from the defendant's counsel's failure to request such a charge. *Howard v. State*, 310 Ga. App. 659, 714 S.E.2d 255 (2011).

16-5-45. Interference with custody.

JUDICIAL DECISIONS

Cited in *In re Levin*, 289 Ga. 170, 709 S.E.2d 808 (2011).

16-5-46. Trafficking of persons for labor or sexual servitude.

Law reviews. — For article on the 2011 amendment of this Code section, see 28 Ga. St. U. L. Rev. 131 (2011). For

article, "Crimes and Offenses: Crimes Against the Person," see 28 Ga. St. U. L. Rev. 131 (2011).

ARTICLE 4

RECKLESS CONDUCT

16-5-60. Reckless conduct causing harm to or endangering the bodily safety of another; conduct by HIV infected persons; assault by HIV infected persons or hepatitis infected persons.

JUDICIAL DECISIONS

Reckless conduct charge not warranted when firing of gun was not negligent. — Defendant's battery conviction under O.C.G.A. § 16-5-23.1(b) was supported by evidence that the defendant struck the victim in the eye with the defendant's hand, causing the eye to swell. A charge on the lesser included offense of reckless conduct under O.C.G.A. § 16-5-60(b) was not warranted because there was no evidence that the defendant fired a gun negligently; the only evidence was that the defendant fired several shots at the victim. *Tiller v. State*, 314 Ga. App. 472, 724 S.E.2d 397 (2012).

Merger with aggravated battery.

Because a charge under O.C.G.A. § 16-5-24(a) for aggravated battery required showings of malice and disfigurement, while the charge under O.C.G.A. § 16-5-60(b) for reckless conduct did not require any more proof beyond showing the defendant shot the victim causing bodily harm, the reckless conduct charge should have merged into the aggravated battery charge as a matter of fact. *DeLeon v. State*, 289 Ga. 782, 716 S.E.2d 173 (2011).

Jury instructions.

Trial court did not err by failing to give the defendant's requested charge on the

lesser included offense of involuntary manslaughter, O.C.G.A. § 16-5-3, because the defendant's admitted act of purposefully putting a gun to the fearful victim's head and pulling the trigger constituted the felony offense of aggravated assault, O.C.G.A. § 16-5-21, not reckless conduct, O.C.G.A. § 16-5-60(b); the defendant's testimony that the victim began crying when the victim saw the gun provided evidence that the victim perceived the gun to be a loaded weapon that could be used to inflict a violent injury, which was a reasonable perception, and the jury's verdict of guilty on the felony murder charge established the existence of all the elements of the underlying felony offense of aggravated assault. *Jones v. State*, 289 Ga. 145, 710 S.E.2d 127 (2011).

Defendant was not entitled to a jury charge on the misdemeanors of reckless conduct, O.C.G.A. § 16-5-60(b), as a lesser included offense of the felony counts of aggravated assault because although the defendant relied upon evidence that the defendant was intoxicated, the defendant cited no evidence that the defendant's intoxicated state was involuntary or that the intoxication resulted in any permanent brain function alteration. *Dailey v. State*, 313 Ga. App. 809, 723 S.E.2d 43 (2012).

ARTICLE 5

CRUELTY TO CHILDREN

16-5-70. Cruelty to children.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

APPLICATION

MERGER WITH OTHER OFFENSES

JURY ISSUES AND INSTRUCTIONS

General Consideration

Evidence sufficient to support conviction. — Mother's conviction was affirmed because there was evidence from which the jury could infer that the mother was aware of the boyfriend's sexual abuse of her daughters but did not adequately intervene. The evidence was therefore sufficient to support the mother's convictions of cruelty to children in the first degree. *Adorno v. State*, No. A11A2272; No. A11A2273, 2012 Ga. App. LEXIS 226 (Mar. 1, 2012).

Motion to withdraw guilty plea. — Trial court did not err in denying the defendant's motion to withdraw the guilty plea to armed robbery, O.C.G.A. § 16-8-41(a), aggravated assault with a deadly weapon, O.C.G.A. § 16-5-21(a)(2), cruelty to children in the first degree, O.C.G.A. § 16-5-70(b), and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106(b)(1), because the state met the state's burden of showing that the defendant understood the constitutional rights the defendant was giving up by pleading guilty, that the defendant understood that since the plea was non-negotiated, the trial court would sentence the defendant to at least ten years imprisonment and could sentence the defendant to a maximum sentence of life in prison, and that the defendant knowingly and voluntarily entered the guilty plea in order to avoid a trial on the indicted charges. *Carson v. State*, 314 Ga. App. 225, 723 S.E.2d 516 (2012).

Sentence proper. — Defendant failed to demonstrate that the defendant's sentence of ten years for cruelty to children in the second degree, O.C.G.A. § 16-5-70(c), and contributing to the deprivation of a minor, O.C.G.A. § 16-12-1(b)(3), were unlawful because the trial court found that the defendant's defense was based upon lies and asserted in bad faith; the sentences were within the statutory limits for each of the crimes for which the defendant was convicted pursuant to O.C.G.A. §§ 16-5-70(e)(2) and 16-12-1(b). *Staib v.*

State, 309 Ga. App. 785, 711 S.E.2d 362 (2011).

Application**Whipping of child.**

Evidence that a six-year-old victim was spending the night at the defendant's house when the defendant became angry because the victim broke a pair of glasses and whipped the victim with a telephone cord, leaving wounds on the victim's back, buttocks, thighs, and groin, was sufficient to support defendant's conviction of first-degree child cruelty in violation of O.C.G.A. § 16-5-70. *Chambers v. State*, 313 Ga. App. 39, 720 S.E.2d 358 (2011).

Cruel and excessive mental pain.

Evidence was sufficient to support the defendant's conviction for cruelty to children in the second degree because there was more than sufficient evidence from which the jury could infer that the defendant's children had suffered cruel and excessive mental pain as a result of the patently unhealthy, filthy, and dangerous conditions in which the children were forced to live; the state presented overwhelming evidence of the filthy and neglected conditions of the children, the children's significant developmental delays, one child's confinement to a urine and feces-stained crib without a diaper, and the fact that another child was locked in a urine-soiled bedroom without access to a toilet. *Staib v. State*, 309 Ga. App. 785, 711 S.E.2d 362 (2011).

Evidence was sufficient to convict the defendant of cruelty to children in the second degree because the jury was authorized to conclude that the presence of an unembalmed corpse in the minor children's home for nearly three days was a criminally negligent act constituting an unsanitary condition and to infer from the reaction of the police officers that the resulting stench caused the children excessive mental pain; neither an incomplete understanding by the children nor an absence of physical symptoms, such as vomiting, would preclude the internal experience of excessive mental pain. *Walden*

v. State, 289 Ga. 845, 717 S.E.2d 159 (2011).

Failure to procure medical treatment.

Evidence was sufficient to support the defendant's conviction for cruelty to children in the first degree, O.C.G.A. § 16-5-70(b), because after the victim sustained second and third degree burns, the defendant failed to seek immediate treatment for the victim, and the defendant also prevented the victim's mother from taking the victim to the hospital for treatment; during the delay in which appropriate medical treatment was withheld, the victim had difficulty eating and sleeping, became dehydrated, and developed an infection in the area of the burns. *Wells v. State*, 309 Ga. App. 661, 710 S.E.2d 860 (2011).

Malnutrition.

Evidence was sufficient to support a father's malice murder conviction and a mother's conviction of felony murder during first-degree child cruelty under O.C.G.A. § 16-5-70(a) since extensive medical testimony showed their baby's need of medical attention and the baby's condition of extreme malnourishment or starvation causing death. *Sanders v. State*, 289 Ga. 655, 715 S.E.2d 124 (2011).

Felony murder conviction upheld.

The following evidence was sufficient to establish that the defendant acted with malice and thus supported the defendant's convictions of felony murder and the predicate felonies of aggravated battery, O.C.G.A. § 16-5-24(a), and first-degree child cruelty, O.C.G.A. § 16-5-70: 1) the defendant claimed the victim, a 16-month-old child who had been left in the defendant's care, became unresponsive and that the defendant shook the child in an attempt to revive the child; 2) a medical examiner testified that the victim died from head trauma; 3) the victim's 10-year-old sibling testified that the defendant had struck the victim in the past and had been yelling at the victim before the victim lost consciousness. *Sears v. State*, 290 Ga. 1, 717 S.E.2d 453 (2011).

Evidence sufficient for conviction.

Evidence was sufficient to support the defendant's conviction for cruelty to children in the second degree, O.C.G.A.

§ 16-5-70(c), because the evidence authorized a finding that the defendant acted with the requisite criminal negligence under O.C.G.A. §§ 16-2-1(b) and 16-5-70(c) in causing the victim to sustain severe, painful burns to the victim's body; the state's expert testified that the victim's burns were inconsistent with the defendant's claim that the incident leading to the victim's injuries was merely accidental. *Wells v. State*, 309 Ga. App. 661, 710 S.E.2d 860 (2011).

Evidence was sufficient to support the defendant's convictions for aggravated battery, O.C.G.A. § 16-5-24(a), first degree cruelty to children, O.C.G.A. § 16-5-70(b), and second degree cruelty to children, O.C.G.A. § 16-5-70(c), because the victim stated in a forensic interview and testified at trial that the defendant had burned the victim with hot water on more than one occasion and that the defendant had slapped the victim's face and punched the victim in the stomach; the victim was admitted to the hospital with severe burns on the feet, buttocks, and scrotum, and the victim's mother testified that the victim had been under the defendant's care at the time the victim received the burns. *Jackson v. State*, 310 Ga. App. 476, 713 S.E.2d 679 (2011).

Because the defendant pointed a gun at the victim while defendant's accomplices robbed the victim, and thereafter shot at the victim's trailer, hitting a child and killing the victim's sister-in-law, the evidence was sufficient to find defendant guilty of felony murder, aggravated assault, armed robbery, cruelty to children, possession of a gun during the commission of a crime, and possession of a revolver by a person under the age of 18. *Lytle v. State*, 290 Ga. 177, 718 S.E.2d 296 (2011).

Party to crime of cruelty to children. — Jury was authorized to find that the defendant was a party to the codefendant's crime of cruelty to children in the first degree in violation of O.C.G.A. §§ 16-2-20 and 16-5-70(b) because the victim's testimony showed that the defendant was present during the codefendant's beating of the victim yet did nothing to stop the codefendant or otherwise help the victim; there was also evidence that the defendant was not only aware of prior

abuse that the victim sustained via a belt but had also participated in such prior abuse. *Tabb v. State*, 313 Ga. App. 852, 723 S.E.2d 295 (2012).

Defendant eligible to serve ordered term of confinement. — Trial court did not err in denying the defendant's motion to correct an illegal sentence because in accordance with the plain language of the First Offender Act, O.C.G.A. § 42-8-65(c), during the defendant's term of confinement, the defendant, who pled guilty to first degree cruelty to children, O.C.G.A. § 16-5-70, was deemed to be a convicted felon for purposes of the State-Wide Probation Act, O.C.G.A. § 42-8-35.4, and consequently, within a category of persons eligible to serve the ordered term of confinement at a probation detention center; the legislature is presumed to have had full knowledge of the First Offender Act, O.C.G.A. § 42-8-65(c), when the legislature enacted the State-Wide Probation Act, O.C.G.A. § 42-8-35.4. *Mason v. State*, 310 Ga. App. 118, 712 S.E.2d 76 (2011).

Merger with Other Offenses

Cruelty to children and child molestation do not merge. — Trial court did not err in failing to merge the defendant's convictions for child molestation, O.C.G.A. § 16-6-4(a), and cruelty to children because each crime required proof of at least one additional element that the other did not, and thus, even if the same conduct established the commission of both child molestation and cruelty to children, the two crimes did not merge; cruelty to children, but not child molestation, requires proof that the victim was a child under the age of 18 who was caused cruel or excessive physical or mental pain, O.C.G.A. § 16-5-70(b), and in contrast, child molestation, but not cruelty to children, requires proof that the victim was under 16 years of age and that the defendant performed an immoral or indecent act upon or in the presence of the child for the purpose of arousing or satisfying the defendant's or the child's sexual desires under O.C.G.A. § 16-6-4(a). *Chandler v. State*, 309 Ga. App. 611, 710 S.E.2d 826 (2011).

Rule of lenity did not apply to multiple convictions.

Because attempted murder and aggra-

vated assault were felonies under O.C.G.A. §§ 16-4-6(a), 16-5-21(j), and because first- and third-degree cruelty to children could not be proven by the same evidence under O.C.G.A. § 16-5-70(b), (d)(2), the rule of lenity did not apply; therefore, the trial court properly denied defendant's motion for a new trial. *Rollf v. State*, No. A11A2042, 2012 Ga. App. LEXIS 242 (Mar. 5, 2012).

Deprivation of minor conviction did not merge with cruelty to children conviction. — Trial court did not err in failing to merge the defendant's misdemeanor convictions for contributing to the deprivation of a minor, O.C.G.A. § 16-12-1(b)(3), with the defendant's corresponding felony convictions for cruelty to children in the second degree, O.C.G.A. § 16-5-70(c), pursuant to the "required evidence" test, the offenses did not merge as a matter of law; the offenses of cruelty to children in the second degree and contributing to the deprivation of a minor each have at least one essential element that the other does not: causing the child cruel or excessive physical or mental pain and wilfully failing to provide the child with the proper care necessary for his or her health, respectively. *Staib v. State*, 309 Ga. App. 785, 711 S.E.2d 362 (2011).

Jury Issues and Instructions

Sufficiency of charge.

Trial counsel was not ineffective for failing to object to the trial court's jury charge on justifiable parental discipline, O.C.G.A. § 16-3-20(3), because the trial court was authorized to give a justifiable parental discipline jury charge that was adequately adjusted to the evidence in the case; because it was for the jury to decide whether or not the codefendant's conduct caused the victim to suffer cruel or excessive physical pain, any objection to the trial court's jury charge on justifiable parental discipline would have lacked merit. *Tabb v. State*, 313 Ga. App. 852, 723 S.E.2d 295 (2012).

Failure to charge on accident. — In a prosecution for felony murder and the predicate felonies of aggravated battery, O.C.G.A. § 16-5-24(a), and first-degree child cruelty, O.C.G.A. § 16-5-70, assuming *arguendo* that the evidence supported

an instruction on accident, the trial court's failure to give that instruction was not reversible error as the jury's conclusion that the defendant acted with malice, which was supported by overwhelming

evidence, necessarily meant that the jury would have rejected any accident defense. *Sears v. State*, 290 Ga. 1, 717 S.E.2d 453 (2011).

ARTICLE 7

STALKING

16-5-90. Stalking; psychological evaluation.

JUDICIAL DECISIONS

"Surveillance" defined. — Although O.C.G.A. § 16-5-90(a) failed to define the term "surveillance," the term was readily understood by people of ordinary intelligence as meaning a close watch kept over someone or something. Accordingly, the indictment put defendant on notice that driving to, parking at, and sitting outside the victim's residence constituted "surveillance." *Jones v. State*, 310 Ga. App. 705, 713 S.E.2d 895 (2011).

Evidence insufficient for conviction.

Imposition of a stalking protective order against the former boyfriend was inappropriate under O.C.G.A. §§ 16-5-90(a)(1), 16-5-94(e), and 19-13-3(c) because the evidence admitted at the hearing was clearly insufficient to establish the necessary "pattern" of harassing and intimidating behavior against the former girlfriend. Even assuming that an incident in the parking lot constituted the requisite contact of an intimidating or harassing na-

ture, the only other evidence presented was that the parties would sometimes be in the same place at the school, which was a place that both had the right to be. *Ramsey v. Middleton*, 310 Ga. App. 300, 713 S.E.2d 428 (2011).

Evidence insufficient for protective order.

Trial court abused the court's discretion by issuing a protective order against a lessee because a lessor did not meet the burden under O.C.G.A. §§ 16-5-94(e) and 19-13-3(c) of showing that the lessee committed the offense of stalking, O.C.G.A. § 16-5-90(a)(1); other than the lessor's own testimony, the lessor offered no proof that the lessee and a former business associate were acting in concert against the lessor or that their alleged joint activities were of the type that would support a protective order based on the offense of stalking. *Martin v. Woodyard*, 313 Ga. App. 797, 723 S.E.2d 293 (2012).

Cited in *Brooks v. State*, 313 Ga. App. 789, 723 S.E.2d 29 (2012).

16-5-91. Aggravated stalking.

JUDICIAL DECISIONS

Molestation allegations not relevant. — Trial court did not err by excluding the proffered testimony of a witness concerning allegations of abuse by the victim's son against the daughter of the defendant and the victim because the trial court was authorized to conclude that the substantive molestation allegations were not relevant to the aggravated stalking charges against the defendant; the defen-

dant was otherwise allowed to challenge the victim's motives and truthfulness without interjecting immaterial matter at the trial. *Brooks v. State*, 313 Ga. App. 789, 723 S.E.2d 29 (2012).

Evidence cumulative of defendant's testimony. — Trial court did not err by limiting the testimony of a witness because the defendant did not establish that the witness's testimony was relevant to

the aggravated stalking offenses as charged; the excluded evidence would have been cumulative of the defendant's trial testimony that the defendant was not personally following or watching the victim. *Brooks v. State*, 313 Ga. App. 789, 723 S.E.2d 29 (2012).

Evidence sufficient for conviction.

As the evidence showed that the defendant was prohibited from contacting a victim due to a protective order, that the defendant violated that order, and that the defendant's contact was for the purposes of harassing and intimidating the victim, the evidence was sufficient to support the defendant's conviction for aggravated stalking in violation of O.C.G.A. § 16-5-91(a). *Herbert v. State*, 311 Ga. App. 396, 715 S.E.2d 795 (2011).

Jury was authorized to find the defendant guilty of aggravated stalking in violation of O.C.G.A. § 16-5-91(a) because the victim testified that the defendant had previously threatened the victim, the defendant had a history of violence against the victim, and the defendant made repeated phone calls and sent several text messages to the victim; while the defendant denied at trial that the defendant called the victim, the jury was free to reject that testimony and believe that of the victim, and the defendant did not deny sending text messages to the victim after the defendant's release from jail. *Brooks v. State*, 313 Ga. App. 789, 723 S.E.2d 29 (2012).

Evidence insufficient for conviction.

Insufficient evidence supported the defendant's aggravated stalking conviction because a divorce court order on which the

prosecution relied merely barred the defendant from the home the defendant had shared with the victim, rather than prohibiting the defendant from having contact with the victim, so the order did not "in effect" prohibit the defendant from engaging in conduct that was prohibited by the statute. *Keaton v. State*, 311 Ga. App. 14, 714 S.E.2d 693 (2011).

Motion to sever murder and aggravated stalking denied. — Trial court properly exercised the court's discretion in denying the defendant's motion to sever the count of the indictment charging aggravated stalking from the counts relating to murder because evidence of the stalking offense would be admissible in a separate murder trial; evidence of the defendant's turbulent relationship with the stalking victim and the stalking of that victim was relevant to explain the defendant's animosity for the murder victim and the defendant's motive for the fatal attack. *Carruth v. State*, 290 Ga. 342, 721 S.E.2d 80 (2012).

Jury instruction on harassing phone calls and violation of temporary protective order not warranted. — Trial court did not err by failing to give the defendant's requested charges on the lesser included offenses of harassing phone calls and violation of a temporary protective order because the state's evidence was sufficient to establish all of the elements of the aggravated stalking offenses as indicted; under the evidence, either the defendant was guilty of the indicted offenses or the defendant was guilty of no offense whatsoever. *Brooks v. State*, 313 Ga. App. 789, 723 S.E.2d 29 (2012).

16-5-94. Restraining orders; protective orders.

Law reviews. — For comment, "Engendering Fairness in Domestic Violence Arrests: Improving Police Accountability

Through the Equal Protection Clause," see 60 *Emory L.J.* 1011 (2011).

JUDICIAL DECISIONS

Evidence insufficient for protective order.

Imposition of a stalking protective order against the former boyfriend was inappro-

priate under O.C.G.A. §§ 16-5-90(a)(1), 16-5-94(e), and 19-13-3(c) because the evidence admitted at the hearing was clearly insufficient to establish the neces-

sary “pattern” of harassing and intimidating behavior against the former girlfriend. Even assuming that an incident in the parking lot constituted the requisite contact of an intimidating or harassing nature, the only other evidence presented was that the parties would sometimes be in the same place at the school, which was a place that both had the right to be. *Ramsey v. Middleton*, 310 Ga. App. 300, 713 S.E.2d 428 (2011).

Trial court abused the court’s discretion by issuing a protective order against a

lessee because a lessor did not meet the burden under O.C.G.A. §§ 16-5-94(e) and 19-13-3(c) of showing that the lessee committed the offense of stalking, O.C.G.A. § 16-5-90(a)(1); other than the lessor’s own testimony, the lessor offered no proof that the lessee and a former business associate were acting in concert against the lessor or that their alleged joint activities were of the type that would support a protective order based on the offense of stalking. *Martin v. Woodyard*, 313 Ga. App. 797, 723 S.E.2d 293 (2012).

CHAPTER 6

SEXUAL OFFENSES

16-6-1. Rape.

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- MERGER AND OTHER OFFENSES
- JURY INSTRUCTIONS
- SUFFICIENCY OF EVIDENCE

General Consideration

Venue sufficiently established. — Trial court did not err in denying the defendant’s motion for new trial after the defendant was convicted of rape because venue was sufficiently established by a detective’s testimony that the apartment complex where the crimes occurred was in DeKalb County, and even accepting the defendant’s argument that the evidence only supported the conclusion that the victim could have been driven into another county before the rape occurred, that would not preclude a jury’s conclusion that venue could be proper in DeKalb County; because the most definite testimony regarding the location of the crimes related to DeKalb County, the jury was authorized to find beyond a reasonable doubt that the rape could have occurred there. *Bizimana v. State*, 311 Ga. App. 447, 715 S.E.2d 754 (2011).

Denial of defendant’s motion for a directed verdict of acquittal, etc. Defendant’s complaint that the trial court erred in denying the defendant’s motion for a directed verdict of acquittal as to the offense of forcible rape was rendered moot because the defendant was not found guilty of that offense. *Beaudoin v. State*, 311 Ga. App. 91, 714 S.E.2d 624 (2011).

Counsel not ineffective in rape trial. — Defendant was not prejudiced by trial counsel’s failure to object to testimony speculating as to the defendant’s state of mind because there was no reasonable likelihood that the testimony contributed to the guilty verdict on the lesser charge of attempted rape; the testimony regarding the victim’s belief as to why the defendant was following the van in which the victim was traveling was not relevant to the consideration of the charges against the defendant, rape or attempted rape.

Gomez-Oliva v. State, 312 Ga. App. 105, 717 S.E.2d 689 (2011).

Merger and Other Offenses

Aggravated assault merged with rape.

Defendant's conviction for aggravated assault with intent to rape under O.C.G.A. § 16-5-21(a)(1) merged into the defendant's conviction for attempted rape under O.C.G.A. §§ 16-4-1 (criminal attempt) and 16-6-1 (rape) because the same evidence supported both convictions and, therefore, the aggravated assault conviction was vacated. *Smith v. State*, 313 Ga. App. 170, 721 S.E.2d 165 (2011).

Jury Instructions

Charge proper. — While the indictment alleged that the defendant had carnal knowledge of a child under 16 years of age and the jury charge stated that the defendant could be convicted of rape for having carnal knowledge of a female under 10 years of age, there was no error because the evidence supported a determination that the victim was under 10 and the defendant did not challenge the sufficiency of that evidence. *Brown v. State*, No. A11A1963, 2012 Ga. App. LEXIS 326 (Mar. 23, 2012).

Sufficiency of Evidence

Evidence of similar prior offense held admissible.

During the defendant's trial for rape, the trial court did not err by permitting the state to present evidence of a prior similar transaction because the prior transaction evidence was proper and not foreclosed by collateral estoppel since identity and commission of the act were not at issue in the first trial; identity was not an issue in the prior case because the defendant claimed that consensual sex, and in the case before the trial court, identity was one of the purposes for which the state sought to have the similar transaction evidence admitted since the defendant claimed that he did not know the victim and had not raped her. *Bell v. State*, 311 Ga. App. 289, 715 S.E.2d 684 (2011).

Sufficient evidence to authorize conviction.

Evidence was sufficient to authorize the jury to find the defendant guilty of statutory rape beyond a reasonable doubt because the defendant befriended the 12-year-old victim, and on various occasions the defendant engaged in sexual contact with the victim; the defendant fondled the victim's breasts and vaginal area, inserted his finger into her vagina, and inserted his penis into her mouth and vagina. *Beaudoin v. State*, 311 Ga. App. 91, 714 S.E.2d 624 (2011).

Victim's testimony alone sufficient.

Evidence was sufficient to convict the defendant of rape in violation of O.C.G.A. § 16-6-1 because, without anything more, the victim's testimony was enough to permit a rational trier of fact to find beyond a reasonable doubt that the defendant committed rape; the victim testified at trial and stated that the defendant entered the victim's bedroom, held down the victim's hands as the victim tried to push the defendant away, and had sexual intercourse with the victim as the victim screamed. *Roberts v. State*, 313 Ga. App. 849, 723 S.E.2d 73 (2012).

Evidence sufficient to support conviction.

Evidence overwhelmingly supported the defendant's conviction for forcible rape in violation of O.C.G.A. § 16-6-1(a)(1) because the state introduced the victim's testimony, the testimony of eyewitnesses to the act, the examining physician's testimony, and the photographic evidence. *Strozier v. State*, 314 Ga. App. 432, 724 S.E.2d 446 (2012).

Evidence sufficient for conviction of attempted rape.

Evidence was sufficient to support the defendant's conviction for attempted rape in violation of O.C.G.A. §§ 16-4-1 and 16-6-1(a)(1) because the victim's testimony as to the defendant forcing his penis into her vagina against her will sufficed to sustain the attempted rape conviction. *Gomez-Oliva v. State*, 312 Ga. App. 105, 717 S.E.2d 689 (2011).

16-6-2. Sodomy; aggravated sodomy; medical expenses.

JUDICIAL DECISIONS

ANALYSIS

AGGRAVATED SODOMY

Aggravated Sodomy

Prior similar transactions evidence admissible.

Trial court did not err in admitting similar transaction evidence because certified copies of the defendant's prior conviction were sufficient to prove not only the similarity between the crimes for which the defendant was convicted, aggravated sexual battery, aggravated sodomy, child molestation, and enticing a child for indecent purposes, and the former crimes but also to establish that the defendant was, in fact, convicted of those offenses; the certified copies the state submitted included an indictment charging the defendant with continuous sexual abuse against a child to whom the defendant had recurring access and with whom the defendant engaged in three and more acts of lewd and lascivious conduct and

with lewd and lascivious conduct upon the same child. *Spradling v. State*, 310 Ga. App. 337, 715 S.E.2d 672 (2011).

Evidence sufficient for conviction.

Evidence was more than sufficient to support the jury's conclusion that the defendant committed the crimes of kidnapping with bodily injury, aggravated child molestation, aggravated sodomy, child molestation, enticing a child for indecent purposes, and cruelty to children because the state offered significant evidence connecting the defendant to the assault, including the defendant's confession to police, the testimony of the victim's uncle that the defendant was the only individual who fit the victim's description, and evidence that both the defendant and the victim were treated for a sexually transmitted disease. *Dunson v. State*, 309 Ga. App. 484, 711 S.E.2d 53 (2011).

16-6-4. Child molestation; aggravated child molestation.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

APPLICATION

MERGING WITH OTHER OFFENSES

JURY ISSUES AND INSTRUCTIONS

General Consideration

Indictment was not flawed for charging several ways of committing the crime. — Child molestation defendant's behavior in the indictments occurred during the time alleged in the indictments, and the evidence, including testimony from the victims, was sufficient to show that the defendant committed child molestation in at least one of the ways alleged in the indictments. Therefore, even though the indictment used the conjunctive rather than the disjunctive form, the indictment was sufficient. *Cain*

v. State, 310 Ga. App. 442, 714 S.E.2d 65 (2011).

Venue.

Trial court did not err in denying the defendant's motion for directed verdict because the testimony, taken as a whole, was sufficient evidence from which the jury could conclude beyond a reasonable doubt that the child molestation was committed in Fayette County; during trial and the victim's forensic interview, the victim described that the molestation incident occurred during a visit to the victim's aunt's residence, which was located in

Fayette County, Georgia, and two detectives testified that the referenced visit and molestation incident took place at a residence in Fayette County. *Hargrave v. State*, 311 Ga. App. 852, 717 S.E.2d 485 (2011).

Severance of offenses.

Trial court did not abuse the court's discretion in denying the defendant's motion to sever the offenses involving two child molestation victims because although the charged offenses involved different victims and occurred on different dates, the actions showed the defendant's common motive, lustful disposition, and bent of mind to satisfy the defendant's sexual desires; the defendant gained access to the second victim through a familial relationship with the first victim, and the molestation of the first victim came to light during the investigation of the molestation of the second victim. *Stepho v. State*, 312 Ga. App. 495, 718 S.E.2d 852 (2011).

Severance of four counts of child molestation and enticing a child, O.C.G.A. §§ 16-6-4(a)(1) and 16-6-5, was not required because the evidence regarding the events was not confusing or complicated, and each of the incidents would have been admissible as a similar crime in a trial of the other incidents. *Heck v. State*, 313 Ga. App. 571, 722 S.E.2d 166 (2012).

Cited in *Marshall v. Browning*, 310 Ga. App. 64, 712 S.E.2d 71 (2011); *Bolton v. State*, 310 Ga. App. 801, 714 S.E.2d 377 (2011); *Kaylor v. State*, 312 Ga. App. 633, 719 S.E.2d 530 (2011).

Application

Victim's testimony alone is sufficient to sustain conviction under O.C.G.A. § 16-6-4.

Victim's testimony that when she was 14 years old, the defendant, her step-father, entered her bedroom, laid on top of her, rubbed her breasts, and kissed her on the mouth, neck, and breasts was sufficient to support a jury verdict that the defendant was guilty of child molestation in violation of O.C.G.A. § 16-6-4(a). *Damerow v. State*, 310 Ga. App. 530, 714 S.E.2d 82 (2011).

Evidence from a child molestation victim was sufficient to convict a defendant of

five counts of child molestation in violation of O.C.G.A. § 16-6-4. The trial court properly admitted evidence that the defendant had asked the victim's sister to sleep with the defendant on a couch, and properly denied evidence that the victim had made an accusation of sexual misconduct against the victim's grandfather. *Mauldin v. State*, 313 Ga. App. 228, 721 S.E.2d 182 (2011).

Recanting of child victim's testimony.

Evidence was sufficient to sustain the defendant's convictions for child molestation, O.C.G.A. § 16-6-4(a), and aggravated child molestation, § 16-6-4(c), because although the victim recanted prior statements concerning the defendant's acts of sodomy, the recantation did not preclude a conviction since the victim's prior inconsistent statements concerning the defendant's acts of sodomy were allowed to serve as substantive evidence of the defendant's guilt. *Stepho v. State*, 312 Ga. App. 495, 718 S.E.2d 852 (2011).

Admissibility of evidence of similar or connected offenses against children.

During the defendant's trial for aggravated child molestation and child molestation, the trial court did not abuse the court's discretion in admitting the similar transaction evidence regarding the defendant's prior aggravated molestation of another young boy because the evidence of the defendant's prior aggravated child molestation was appropriate for showing the defendant's lustful disposition toward molesting young boys; the state indicated that the state wished to introduce the similar transaction evidence for all appropriate purposes: identity, plan, motive, bent of mind, and course of conduct. *Jackson v. State*, 309 Ga. App. 450, 710 S.E.2d 649 (2011).

Testimony of a defendant's adult step-daughter regarding the defendant's molestation of her when she was a child was admissible as a similar transaction in the defendant's trial for molestation of his two granddaughters because both the present case and the similar transaction involved defendant molesting underage family members who were in his home. *Downer v. State*, 310 Ga. App. 136, 712 S.E.2d 571 (2011).

Trial court did not err in admitting similar transaction evidence because certified copies of the defendant's prior conviction were sufficient to prove not only the similarity between the crimes for which the defendant was convicted, aggravated sexual battery, aggravated sodomy, child molestation, and enticing a child for indecent purposes, and the former crimes but also to establish that the defendant was, in fact, convicted of those offenses; the certified copies the state submitted included an indictment charging the defendant with continuous sexual abuse against a child to whom the defendant had recurring access and with whom the defendant engaged in three and more acts of lewd and lascivious conduct and with lewd and lascivious conduct upon the same child. *Spradling v. State*, 310 Ga. App. 337, 715 S.E.2d 672 (2011).

Because the defendant's prior convictions under O.C.G.A. § 16-12-100.2(d)(1) and (e)(1) and the defendant's indictment for aggravated sexual battery, aggravated child molestation, and child molestation alleged crimes that were sexual in nature with minors and involved a lustful disposition, the independent offenses were admissible under Ga. Unif. Super. Ct. R. 31.3(B). *Butler v. State*, 311 Ga. App. 873, 717 S.E.2d 649 (2011).

Trial court properly admitted similar transaction evidence during the defendant's trial for aggravated child molestation, aggravated sexual battery, and child molestation because despite the defendant's age at the time, the evidence was relevant to show the defendant's lustful disposition with regard to younger females, the conduct with which the defendant was charged; the trial court properly considered the defendant's youth at the time of the similar transaction, along with the significant age difference between the defendant and the victim, the defendant's attempt to conceal the defendant's behavior by acting in secluded locations, and the nature of the acts the defendant committed before concluding that the evidence was admissible. *Ledford v. State*, 313 Ga. App. 389, 721 S.E.2d 585 (2011).

Evidence of similar or connected sexual offenses against adults.

Trial court did not abuse the court's

discretion in admitting the defendant's prior sexual battery conviction during the defendant's trial for child molestation, O.C.G.A. § 16-6-4(a), and aggravated child molestation, O.C.G.A. § 16-6-4(c), because the prior sexual battery and the molestation of the victim were similar; the defendant pled guilty to the sexual battery, establishing that the defendant had committed the separate offense, and both the prior sexual battery and the molestation involved the defendant's acts of touching the female victims' breasts and occurred within a three-month time frame. *Stepho v. State*, 312 Ga. App. 495, 718 S.E.2d 852 (2011).

Spouse guilty of aiding and abetting in child molestation. — Evidence was sufficient to support defendant's convictions of aiding and abetting, under O.C.G.A. § 16-2-20, defendant's spouse in enticing a minor child for indecent purposes, in violation of O.C.G.A. § 16-6-5(a), and of child molestation. Evidence was presented that: (1) when defendant's spouse brought the victim back to their home, the spouse left the victim with defendant who admitted to giving the victim thong panties; (2) defendant gave the victim alcohol, and gave the victim pornographic materials to read before defendant's spouse came home; and (3) defendant was close by on the couch when defendant's spouse pulled down the victim's pants, tried to kiss the victim, pulled down the victim's underwear, and offered the victim money to put on the thong. *Dockery v. State*, 309 Ga. App. 584, 711 S.E.2d 100 (2011).

Evidence was sufficient for the jury to find a defendant guilty of child molestation, etc.

Testimony of one of the defendant's granddaughters to the effect that the defendant touched her genital area with his hand and pulled her hand to touch his penis and the other victim's testimony that the defendant touched her genital area was sufficient to support the verdict of guilty on three child molestation charges in violation of O.C.G.A. § 16-6-4(a). *Downer v. State*, 310 Ga. App. 136, 712 S.E.2d 571 (2011).

Trial court did not err in denying the defendant's motion for new trial pursuant

to O.C.G.A. §§ 5-5-20 and 5-5-21 because the jury was authorized to conclude that the defendant was guilty of child molestation in violation of O.C.G.A. § 16-6-4(a)(1); under the Child Hearsay Statute, O.C.G.A. § 24-3-16, the jury was entitled to consider the victim's out-of-court statements as substantive evidence, and the victim was made available at trial for confrontation and cross-examination, at which time the jury was allowed to judge the credibility of the victim's accusations. *Hargrave v. State*, 311 Ga. App. 852, 717 S.E.2d 485 (2011).

Evidence was sufficient to authorize the finder of fact to find that the defendant acted with the intent to arouse or satisfy the defendant's own or the victim's sexual desires because the defendant touched the victim inappropriately; the testimony of the victim was corroborated by the victim's young cousins, who witnessed the incident, and the victim gave consistent accounts of the incident to police officers, the forensic interviewer, and the victim's aunt's boyfriend. *Reyes-Vera v. State*, 313 Ga. App. 467, 722 S.E.2d 95 (2011).

Evidence of child molestation.

Evidence that a defendant became highly intoxicated while having visitation with his seven-year-old daughter, that he licked her vagina, kissed her with his tongue in her mouth, and made her rub her hand on his penis was sufficient to support convictions for aggravated child molestation in violation of O.C.G.A. § 16-6-4(c). A jury could infer from the evidence that the defendant's intent was to arouse and satisfy his sexual desires pursuant to O.C.G.A. § 16-2-6. *Obeginski v. State*, 313 Ga. App. 567, 722 S.E.2d 162 (2012).

Evidence sufficient for conviction.

Evidence was more than sufficient to support the jury's conclusion that the defendant committed the crimes of kidnapping with bodily injury, aggravated child molestation, aggravated sodomy, child molestation, enticing a child for indecent purposes, and cruelty to children because the state offered significant evidence connecting the defendant to the assault, including the defendant's confession to police, the testimony of the victim's uncle that the defendant was the only individ-

ual who fit the victim's description, and evidence that both the defendant and the victim were treated for a sexually transmitted disease. *Dunson v. State*, 309 Ga. App. 484, 711 S.E.2d 53 (2011).

Jury was presented with sufficient evidence to find the defendant guilty of child molestation in violation of O.C.G.A. § 16-6-4(a)(1) because the testimony of the defendant's former wife regarding what she observed on the night in question, i.e., that the defendant and the victim were asleep together with their underwear pulled down and that she saw what appeared to be fecal matter smeared on the victim's buttocks and the bed sheets, was sufficient for the jury to conclude that the victim's and the defendant's otherwise inexplicable mutual exposure was for the purpose of satisfying the defendant's own sexual desires. *DeLong v. State*, 310 Ga. App. 518, 714 S.E.2d 98 (2011).

Evidence insufficient for conviction. — Evidence was insufficient to sustain all four of the defendant's convictions for aggravated child molestation, because a jury reasonably could have inferred that the "bad things" the victim testified the defendant did two or three times a month during the time the victims lived in Oconee County involved defendant's routine and, therefore, defendant performing oral sex on the victim. *Bibb v. State*, No. A11A1831, 2012 Ga. App. LEXIS 313 (Mar. 21, 2012).

Directed verdict of acquittal unwarranted, etc.

When the defendant was charged with using the Internet to seduce, solicit, lure, or entice a child or a person believed to be a child to commit an illegal sex act, under O.C.G.A. § 16-12-100.2(d)(1), attempted aggravated child molestation, under O.C.G.A. §§ 16-4-1 and 16-6-4(c), and attempted child molestation, under §§ 16-4-1 and 16-6-4(a), it was not error to deny the defendant's motion for a directed verdict of acquittal, based on entrapment, because the jury's determination that entrapment did not occur was supported by evidence that: (1) the defendant continued communicating with a person the defendant believed to be 14 years old, including having sexually explicit conversations with the person in which the defendant

stated the defendant wanted “a lot of oral,” after the defendant learned that the person was 14 years old; (2) the defendant discussed with the person how the person could meet the defendant if the person could not drive, inquired whether the person had ever snuck away from home before, and stated that the defendant believed the union would be legal if the defendant were 16 years old, instead of the defendant’s actual age; (3) the defendant left the defendant’s home of Tennessee to meet a purportedly 14-year-old girl in order to have sex with the person, which the defendant admitted in the defendant’s statements to officers; and (4) the defendant brought condoms with the defendant, which the defendant stated were to prevent any “accidents” in the event the defendant was able to have sex with the person. *Millsaps v. State*, 310 Ga. App. 769, 714 S.E.2d 661 (2011).

Merging With Other Offenses

Charge of two crimes for same described act.

Charges of aggravated sexual battery and child molestation, O.C.G.A. §§ 16-6-22.2(b) and 16-6-4, respectively, were indistinguishable because all of the averments including the date, the victim, and the description of the defendant’s conduct constituting the offense were identical. The charges should have merged for sentencing. *Hudson v. State*, 309 Ga. App. 580, 711 S.E.2d 95 (2011).

Lesser offense of cruelty to children, etc.

Trial court did not err in failing to merge the defendant’s convictions for child molestation, O.C.G.A. § 16-6-4(a), and cruelty to children because each crime required proof of at least one additional

element that the other did not, and thus, even if the same conduct established the commission of both child molestation and cruelty to children, the two crimes did not merge; cruelty to children, but not child molestation, requires proof that the victim was a child under the age of 18 who was caused cruel or excessive physical or mental pain, O.C.G.A. § 16-5-70(b), and in contrast, child molestation, but not cruelty to children, requires proof that the victim was under 16 years of age and that the defendant performed an immoral or indecent act upon or in the presence of the child for the purpose of arousing or satisfying the defendant’s or the child’s sexual desires under O.C.G.A. § 16-6-4(a). *Chandler v. State*, 309 Ga. App. 611, 710 S.E.2d 826 (2011).

Jury Issues and Instructions

Charge to jury.

Defendant was entitled to a new trial because there was a reasonable possibility that the jury convicted the defendant of child molestation, O.C.G.A. § 16-6-4(a), in a manner not charged in the indictment since the trial court did not give a limiting instruction to ensure that the jury would find the defendant guilty in the specific manner charged in the indictment or instruct the jury not to consider child molestation as having occurred in another manner; when the jury expressed the jury’s confusion by asking whether sexual conversations could constitute an immoral or indecent act, the trial court should have instructed the jury to limit the jury’s consideration to determining whether the defendant was guilty of committing child molestation in the specific manner alleged in the indictment only. *Smith v. State*, 310 Ga. App. 418, 714 S.E.2d 51 (2011), cert. denied, 2012 Ga. LEXIS 249 (Ga. 2012).

16-6-5. Enticing a child for indecent purposes.

JUDICIAL DECISIONS

Relationship to other law — In that defendant’s prior conviction under O.C.G.A. § 16-6-5 was founded upon defendant’s discussions of illicit sexual acts

with a minor, such actions necessarily related to “aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor” under 18 U.S.C.

§ 2252A(b)(1) for purposes of sentence enhancement. *United States v. McGarity*, 669 F.3d 1218 (11th Cir. 2012).

Evidence of similar prior incident admissible.

Trial court did not err in admitting similar transaction evidence because certified copies of the defendant's prior conviction were sufficient to prove not only the similarity between the crimes for which the defendant was convicted, aggravated sexual battery, aggravated sodomy, child molestation, and enticing a child for indecent purposes, and the former crimes but also to establish that the defendant was, in fact, convicted of those offenses; the certified copies the state submitted included an indictment charging the defendant with continuous sexual abuse against a child to whom the defendant had recurring access and with whom the defendant engaged in three and more acts of lewd and lascivious conduct and with lewd and lascivious conduct upon the same child. *Spradling v. State*, 310 Ga. App. 337, 715 S.E.2d 672 (2011).

Spouse guilty of aiding and abetting in enticing a child for indecent purposes. — Evidence was sufficient to support the defendant's convictions of aiding and abetting, under O.C.G.A. § 16-2-20, defendant's spouse in enticing a minor child for indecent purposes, in violation of O.C.G.A. § 16-6-5(a), and of child molestation. Evidence was presented that: (1) when the defendant's spouse brought the victim back to their home, the spouse left the victim with the defendant who admitted to giving the victim thong panties; (2) the defendant gave the victim alcohol, and gave the victim pornographic materials to read before the defendant's spouse came home; and (3) the defendant was close by on the couch when the defendant's spouse pulled down the victim's pants, tried to kiss the victim, pulled down the victim's underwear, and offered the victim money to put on the thong. *Dockery v. State*, 309 Ga. App. 584, 711 S.E.2d 100 (2011).

Evidence sufficient for conviction.

Evidence was more than sufficient to support the jury's conclusion that the defendant committed the crimes of kidnapping with bodily injury, aggravated child

molestation, aggravated sodomy, child molestation, enticing a child for indecent purposes, and cruelty to children because the state offered significant evidence connecting the defendant to the assault, including the defendant's confession to police, the testimony of the victim's uncle that the defendant was the only individual who fit the victim's description, and evidence that both the defendant and the victim were treated for a sexually transmitted disease. *Dunson v. State*, 309 Ga. App. 484, 711 S.E.2d 53 (2011).

Using an online chat service, a defendant befriended a White County sheriff's investigator whom the defendant believed to be a 14-year-old girl who said she was a virgin. The defendant asked her if she wanted to have sex, described the sex acts the defendant would perform, and masturbated for her over the defendant's webcam, which also showed the defendant's face. After she agreed to meet with the defendant, the defendant then drove to her county and was apprehended near the meeting site with condoms. This evidence was sufficient to convict. *Adams v. State*, 312 Ga. App. 570, 718 S.E.2d 899 (2011), cert. denied, 2012 Ga. LEXIS 263 (Ga. 2012).

Venue.

Based on the allegation that the child enticement was accomplished through an online chat service, venue was not limited to the defendant's physical location at the time the defendant used the service; the state had to prove only that the enticement occurred in White County, and the investigator testified that the investigator was located in White County when the investigator posed as a child to communicate online with the defendant. *Adams v. State*, 312 Ga. App. 570, 718 S.E.2d 899 (2011), cert. denied, 2012 Ga. LEXIS 263 (Ga. 2012).

Severance of offenses. — Severance of four counts of child molestation and enticing a child, O.C.G.A. §§ 16-6-4(a)(1) and 16-6-5, was not required because the evidence regarding the events was not confusing or complicated, and each of the incidents would have been admissible as a similar crime in a trial of the other incidents. *Heck v. State*, 313 Ga. App. 571, 722 S.E.2d 166 (2012).

Cited in Bolton v. State, 310 Ga. App. 801, 714 S.E.2d 377 (2011).

16-6-8. Public indecency.

JUDICIAL DECISIONS

Jail was not public place. — Defendant's conviction for affray in violation of O.C.G.A. § 16-11-32 was reversed because the altercation occurred in the Hall County Jail, which was not a "public

place" as required for conviction pursuant to O.C.G.A. §§ 16-1-3(15) and 16-6-8(d). Singletary v. State, 310 Ga. App. 570, 713 S.E.2d 698 (2011).

16-6-10. Keeping a place of prostitution.

Law reviews. — For article, "Crimes and Offenses: Crimes Against the Person," see 28 Ga. St. U. L. Rev. 131 (2011).

16-6-11. Pimping.

Law reviews. — For article, "Crimes and Offenses: Crimes Against the Person," see 28 Ga. St. U. L. Rev. 131 (2011).

16-6-12. Pandering.

Law reviews. — For article, "Crimes and Offenses: Crimes Against the Person," see 28 Ga. St. U. L. Rev. 131 (2011).

16-6-13. Penalties for violating Code Sections 16-6-9 through 16-6-12.

Law reviews. — For article on the 2011 amendment of this Code section, see 28 Ga. St. U. L. Rev. 131 (2011). For

article, "Crimes and Offenses: Crimes Against the Person," see 28 Ga. St. U. L. Rev. 131 (2011).

16-6-13.1. Testing for sexually transmitted diseases required.

Law reviews. — For article on the 2011 amendment of this Code section, see 28 Ga. St. U. L. Rev. 147 (2011).

16-6-22. Incest.

JUDICIAL DECISIONS

ANALYSIS

RELATIONSHIPS

Relationships

Adopted sibling. — Trial court erred when the court denied the defendant's motion to quash the count of an indictment charging the defendant with incest because the defendant did not commit

incest since the defendant's adoptive sister was not a whole blood or half blood sibling; the incest statute does not prohibit sexual intercourse between a brother and an adoptive sister not related by blood. *Smith v. State*, 311 Ga. App. 757, 717 S.E.2d 280 (2011).

16-6-22.1. Sexual battery.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
APPLICATION
JURY INSTRUCTIONS

General Consideration

Cited in *Marshall v. Browning*, 310 Ga. App. 64, 712 S.E.2d 71 (2011).

Application

Relationship to federal sentencing. — In a case in which a defendant pled guilty to violating 8 U.S.C. § 1326(a) and the defendant objected to a 16-level enhancement under U.S. Sentencing Guidelines Manual § 2L1.2(b)(1)(A)(iii) based on the defendant's conviction in Georgia of sexual battery of a victim under 16, in violation of O.C.G.A. § 16-6-22.1(d), the common definition of sexual abuse of a minor included as an element that the conduct be for a purpose associated with sexual gratification. However, the Georgia offense of sexual battery did not include that as an element; therefore, the Georgia crime of sexual battery under § 16-6-22.1 did not substantially correspond to the common definition of sexual abuse of a minor. *United States v. Hernandez-Gonzalez*, No. 5:11-CR-53, 2012 U.S. Dist. LEXIS 14797 (M.D. Ga. Jan. 31, 2012).

Similar transactions evidence properly admitted.

Trial court properly admitted similar transaction evidence during the defendant's trial for aggravated child molestation, aggravated sexual battery, and child molestation because despite the defendant's age at the time, the evidence was relevant to show the defendant's lustful disposition with regard to younger fe-

males, the conduct with which the defendant was charged; the trial court properly considered the defendant's youth at the time of the similar transaction, along with the significant age difference between the defendant and the victim, the defendant's attempt to conceal the defendant's behavior by acting in secluded locations, and the nature of the acts the defendant committed before concluding that the evidence was admissible. *Ledford v. State*, 313 Ga. App. 389, 721 S.E.2d 585 (2011).

Evidence sufficient for delinquency adjudication. — Evidence was sufficient to adjudicate the juvenile for felony sexual battery in violation of O.C.G.A. § 16-6-22.1; the juvenile court was faced with sufficient evidence to find that the juvenile was responsible for a sexual battery against the victim, who was a classmate of the defendant's and under the age of 16, by intentionally making unwanted physical contact with the victim's breast; the juvenile court was faced with conflicting testimony as to what occurred between the victim and the juvenile, and conflicts in the testimony were a matter of credibility for the trier of fact to resolve. In *the Interest of D.D.*, 310 Ga. App. 329, 713 S.E.2d 440 (2011).

Jury Instructions

Charge on sexual battery not warranted. — Although some evidence showed that the defendant, convicted of aggravated sexual battery under O.C.G.A. § 16-6-22.2(b), touched the victim's va-

gina without penetration, the defendant was not entitled to a jury instruction on the lesser included offense of sexual battery under O.C.G.A. § 16-6-22.1 because

the defendant's defense was that the victim fabricated her claims. *Smith v. State*, 310 Ga. App. 392, 713 S.E.2d 452 (2011).

16-6-22.2. Aggravated sexual battery.

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Admissibility of evidence of similar offenses.

Trial court did not err in admitting similar transaction evidence because certified copies of the defendant's prior conviction were sufficient to prove not only the similarity between the crimes for which the defendant was convicted, aggravated sexual battery, aggravated sodomy, child molestation, and enticing a child for indecent purposes, and the former crimes but also to establish that the defendant was, in fact, convicted of those offenses; the certified copies the state submitted included an indictment charging the defendant with continuous sexual abuse against a child to whom the defendant had recurring access and with whom the defendant engaged in three and more acts of lewd and lascivious conduct and with lewd and lascivious conduct upon the same child. *Spradling v. State*, 310 Ga. App. 337, 715 S.E.2d 672 (2011).

Aggravated sexual battery and child molestation merged. — Charges of aggravated sexual battery and child molestation, O.C.G.A. §§ 16-6-22.2(b) and 16-6-4, respectively, were indistinguishable because all of the averments, includ-

ing the date, the victim, and the description of the defendant's conduct constituting the offense, were identical. The charges should have merged for sentencing. *Hudson v. State*, 309 Ga. App. 580, 711 S.E.2d 95 (2011).

Jury Instructions

Jury charge proper.

Instruction that the defendant could be convicted of aggravated sexual battery by penetrating the sexual organ or the anus, when the indictment alleged penetration of the vagina, was not erroneous because the jury was instructed the jury could only convict the defendant for offenses charged in the indictment. *Brown v. State*, No. A11A1963, 2012 Ga. App. LEXIS 326 (Mar. 23, 2012).

Charge on lesser offense not warranted. — Although some evidence showed that the defendant, convicted of aggravated sexual battery under O.C.G.A. § 16-6-22.2(b), touched the victim's vagina without penetration, the defendant was not entitled to a jury instruction on the lesser included offense of sexual battery under O.C.G.A. § 16-6-22.1 because the defendant's defense was that the victim fabricated her claims. *Smith v. State*, 310 Ga. App. 392, 713 S.E.2d 452 (2011).

